United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

CONSOLIDATED APPENDIX FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

270

No. 21,556
No. 21,557
(Consolidated)

BETTY ANN ZIMMERMAN, Administratrix
of the Estate of Bessie Lee Junes, Deceased,

Appellant,

v.

SAFEWAY STORES, INC.,

and

DR. LEONARD J. HANTSOO,

Appellees.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals

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CONSOLIDATED APPENDIX FOR APPELLANT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Betty Ann Zimmerman, Administratrix of the Estate of Bessie Lee Junes, Deceased,	)	
Plaintiff,	)	
v.	)	C. A.1776-64
Safeway Stores, Inc.,	)	C. A.1777-64 (Consolidated)
Defendant,	)	
and	)	
Dr. Leonard J. Hantsoo,	)	
Defendant.	)	

RELEVANT DOCKET ENTRIES

1964	
July 24	Complaint filed in Civil Action 1776-64
July 24	Complaint filed in Civil Action 1777-64
Aug. 14	Answer filed to Civil Action 1776-64
Aug. 14	Answer filed to Civil Action 1777-64
1965	
Feb. 23	Deposition of Dr. Leonard J. Hantsoo filed in Civil Action 1776-64
Feb. 23	Deposition of Dr. Leonard J. Hantsoo filed in Civil Action 1777-64
June 23	Deposition of Gilbert Perkey filed in Civil Action 1776-64
June 23	Deposition of Gilbert Perkey filed in Civil Action 1777-64
1967	
March 9	Pre-trial statement filed in Civil Action 1776-64
March 9	Pre-trial statement filed in Civil Action 1777-64
Nov. 17	Order granting Directed Verdict to Defendant in Civil Action 1776-64

Nov. 17 Order granting Directed Verdict to Defendant in Civil Action 1777-64

Nov. 27 Notice of Appeal filed in Civil Action 1776-64

Nov. 27 Notice of Appeal filed in Civil Action 1777-64

[Filed July 24, 1964]

Betty Ann Zimmerman, Administratrix of the Estate of Bessie Lee Junes, Deceased, 2528 B. Holman Avenue, Silver Spring, Maryland,	Plaintiff	1776-'64
vs		
Safeway Stores, Inc., 12 - 7th Street, N.E., Washington, D. C.	Defendant	

COMPLAINT FOR DAMAGES AND WRONGFUL DEATH
(For General Damages and Wrongful Death Resulting from Defendant's Negligence Acting by its Agents and Servants)

The plaintiff in the above entitled cause of action, respectfully represents to the Court as follows:

1. The claims for relief herein in behalf of the plaintiff, Betty Ann Zimmerman, administratrix of the estate of Bessie Lee Junes, deceased, who has been duly qualified and appointed as such by the Court, are for general damages and/or for the wrongful death of said decedent against the defendant, Safeway Stores, Inc. a corporation, doing business in the District of Columbia as a grocery store and serving the general public, in an amount in excess of $10,000.00 exclusive of interests and costs, and therefore, plaintiff claims that this cause is properly within the jurisdiction of this Honorable Court.

2. The plaintiff avers and alleges that on or about July 1, 1963, plaintiff's decedent, Bessie Lee Junes, went to the defendant's place of business at 12 - 7th Street, N.E., District of Columbia to buy some groceries and while in the premises of the particular branch of said

Safeway Stores, Inc., as above mentioned, picked some groceries and attempted to place same in one of the shopping carts belonging to said store, and when plaintiff's decedent was putting the groceries she had selected to buy, a loose piece of wire or a part of the shopping cart's basket sprang suddenly and with great force struck decedent's right forearm inflicting deep laceration or wound therein. The decedent's forearm after the application and injection of an antibiotic shot developed a dermatitis with lymphadenitis and fever and became severely swollen and very painful, which condition caused decedent dizziness, fainting, nausea, and headaches accompanied by fever.

3. Plaintiff further avers and alleges that such condition had materially weakened decedent's physical condition, strength and stamina, and likewise has materially aggravated decedent's hypertension condition, so much so, that said decedent was never able to fully recover and has lingered for a considerable period of time at home and in the hospital until she, the said decedent, died at about 9:50 P.M. on July 24, 1963.

5. Plaintiff further avers and alleges that defendant corporation acting by its agents and employees was careless and negligent in placing a defective shopping cart on the floor to be used by its customers, and said corporation defendant was also negligent and careless in placing said shopping cart which it knew to be defective and dangerous or should have known to be such by the exercise of reasonable care and prudence.

6. Plaintiff avers and alleges that the injuries sustained and the suffering injured by decedent as aforesaid were such that if death had not ensued, would have entitled her to have maintained an action and to have recovered damages during her lifetime, but no such action was instituted nor damages recovered during decedent's lifetime.

7. Said decedent left surviving her as her heirs at law and next of kin, her son, Wilbur Lee Junes and her daughter, Betty Ann Zimmerman, your plaintiff herein, each of whom has sustained substantial pecuniary loss by reason of decedent's death, together with expenses

of decedent's last illness and funeral expenses, all to the damage of the plaintiff for the benefit of said heirs at law and next of kin in the sum of Thirty Thousand Dollars ($30,000.00) besides costs of this suit.

WHEREFORE, plaintiff demands judgment against the defendant, Safeway Stores, Inc., in the sum of Thirty Thousand ($30,000.00) Dollars, besides costs.

/s/ Betty Ann Zimmerman

/s/ Eugenio M. Fonbuena
/s/ Thomas T. Kawahara

Attorneys for plaintiff,
713 Central Building, 805 G Street, N. W.
Washington, D. C.

DEMAND FOR A JURY TRIAL

Plaintiff demands a trial by jury on all issues.

/s/ Eugenio M. Fonbuena

[Filed July 24, 1964]

Betty Ann Zimmerman, Administratrix
of the Estate of Bessie Lee Junes, Deceased
2528 B. Holman Avenue
Silver Spring, Maryland,
Plaintiff

vs

1777-'64

Dr. Leonard J. Hantsoo,
701 Maryland Avenue, N.E.
Washington, D. C.
Defendant

COMPLAINT FOR DAMAGES
(For Wrongful Death Resulting from Malpractice by Physician)

The plaintiff in the above entitled cause of action, respectfully represents as follows:

1. The claims for relief herein in behalf of the plaintiff, Betty Ann Zimmerman, administratrix of the estate of Bessie Lee Junes, deceased, who has been duly qualified and appointed as such by the Court, are for damages for the wrongful death of said decedent against the defendant, Leonard J. Hantsoo, a practicing physician, in an amount in excess of $10,000.00 exclusive of interests and costs, and therefore, plaintiff claims that this cause is properly within the jurisdiction of this Court.

2. The plaintiff avers and alleges that the decedent has been a patient of the defendant for a considerable period of time, and that on, to wit, July 2, 1963, the decedent went to the defendant's office for treatment of her injuries or wound which she sustained while shopping at one of the local stores of the Safeway stores, at 12-7th Street, N.E., District of Columbia.

3. The plaintiff further avers and alleges that said defendant upon casual examination of decedent's injured forearm applied and/or injected an antibiotic shot carelessly and negligently without first ascertaining whether decedent was allergic to it, and as a result, decedent's forearm became swollen and painful which condition caused decedent dizziness, fainting, stomach nervousness, nausea, and headaches accompanied by fever. Plaintiff further alleges that defendant was also negligent in that he knew or in the exercise of reasonable care should have known that said decedent's physical condition was such that he should not have applied or injected antibiotic as he did; in that he negligently failed to attend the decedent promptly at the time when decedent's condition was grave and serious and to which condition he has been advised and informed; and in that he failed also to obtain and render other medical attention for decedent while in the hospital, and that as a result of the defendant's various acts of negligence and carelessness, the decedent never fully recovered and eventually died at Eastern Dispensary and Casualty Hospital on July 24, 1963, at approximately 9:50 P.M.

4. The injuries sustained and suffering injured by decedent as aforesaid were such that if death had not ensued would have entitled her to have maintained an action and to have recovered damages during her lifetime, but no such action was instituted nor damages recovered during decedent's lifetime.

5. Said decedent left surviving her as her heirs at law and next of kin, her son, Wilbur Lee Junes and her daughter, Betty Ann Zimmerman, your plaintiff herein, each of whom has sustained substantial pecuniary loss by reason of decedent's death, together with expenses

of decedent's last illness and funeral expenses, all to the damage of the plaintiff for the benefit of said heirs at law and next of kin in the sum of Thirty-five Thousand Dollars ($35,000.00) besides costs of this suit.

WHEREFORE, plaintiff demands judgment against the defendant, Leonard J. Hantsoo, in the sum of THIRTY-FIVE THOUSAND ($35,000.00) Dollars besides costs.

/s/ Betty Ann Zimmerman
Plaintiff

/s/ Eugenio M. Fonbuena

/s/ Thomas T. Kawahara

Attorneys for the plaintiff,
713 Central Building, 805 G Street, N.W.
Washington 1, D. C.

DEMAND FOR A JURY TRIAL

Plaintiff demands a trial by jury on all issues.

/s/ Eugenio M. Fonbuena

[Filed Aug. 14, 1964]

ANSWER (C. A. 1776-64)

First Defense

The complaint fails to state a cause of action entitling the plaintiff to relief.

Second Defense

1. Defendant is without knowledge or information sufficient to form a belief as to whether plaintiff's decedent was a business invitee of the defendant on July 1, 1963, and is further without knowledge or information sufficient to form a belief as to whether she therein sustained any injury.

2. Defendant denies that any injury or damage sustained by plaintiff's decedent resulted from any negligence or carelessness on its part or on the part of any of its agents, servants, or employees.

3. Defendant further denies that the last illness and death of plaintiff's decedent was a result of any alleged occurrence in the defendant's store on July 1, 1963.

4. Defendant is without knowledge or information sufficient to form a belief as to the identity of decedent's heirs at law and next of kin and is further without knowledge or information sufficient to form a belief as to whether either of them suffered pecuniary loss on account of decedent's death.

5. Defendant denies each and every other allegation of the complaint not herein specifically answered.

Third Defense

Any injuries or damages sustained by the next of kin of plaintiff's decedent resulted from the contributory negligence of the decedent.

Fourth Defense

Plaintiff's action is barred by limitations.

HOGAN & HARTSON

By /s/ Paul R. Connolly

Attorneys for Defendant
800 Colorado Building
Washington 5, D. C.

[Certificate of Service]

[Filed Aug. 14, 1964]

ANSWER TO COMPLAINT (C. A. 1777-64)

Comes now, the defendant, Dr. Leonard J. Hantsoo, by and through his attorneys, Welch, Daily & Welch, and for answer to the complaint for damages filed herein, states as follows:

First Defense

This defendant asserts that no claim is stated herein upon which relief may be had against him and therefore prays that the complaint be dismissed.

Second Defense

For further answer to the complaint, and all allegations therein, the defendant neither admits nor denies the allegation of paragraph 1, having insufficient information upon which to form a belief with respect thereto; therefore, such allegations should be specifically proved, and if it should be necessary, defendant denies such allegations.

Defendant admits the allegations of paragraph 2; defendant denies the allegations of paragraphs 3, 4, and 5, in their entirety.

Third Defense

For further defense to the complaint and each paragraph thereof, defendant avers that the medical treatment, examination and care which he administered to the deceased, Bessie Lee Junes, were without fault, neglect or failure of any kind, and were in accord with good and approved medical practice in the District of Columbia at the time in question for the conditions presented, and the condition for which the deceased was hospitalized and which ultimately caused her death, was in no way caused by, aggravated by, or in any way brought about by any act of omission or commission on the part of this defendant, and said condition, and her ensuing death were the result of physical ailments and/or disease from which she unfortunately suffered.

Fourth Defense

For further defense to the complaint, and each paragraph thereof, defendant pleads that the action brought herein was not brought within the time required by the Statute of limitations, Section 16-1202, which provides that every such action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured. Wherefore defendant prays this action be dismissed because of plaintiff's failure to comply with such Statute.

WELCH, DAILY & WELCH

By: /s/ J. Harry Welch
Attorneys for defendant
1511 K Street, N. W.
Washington 5, D. C.

[Certificate of Service]

[Filed March 9, 1967]

PRETRIAL STATEMENT

Consolidated actions:

C.A. 1776-64, survival action and wrongful death action resulting from injury in grocery store;

C.A. 1777-64, wrongful death action for malpractice by treating physician.

UNDISPUTED FACTS:

Plaintiff, Betty Ann Zimmerman, is the Administratrix of the Estate of Bessie Lee Junes, Deceased, having been appointed and qualified in Administration No. 110,617, this Court.

Safeway Stores, Inc., defendant in C.A. 1776-64, is a corporation doing business in the District of Columbia.

Dr. Leonard J. Hantsoo, defendant in C.A. 1777-64, is a licensed physician in the District of Columbia.

On July 1, 1963, plaintiff's decedent, Bessie Lee Junes, was a business invitee in the store of D Safeway at #12 Seventh St., N.E., in the District of Columbia.

On July 1, 1963, P's decedent complained of having sustained an injury on a "bascart" in the store, and decedent was rendered first aid by an employee of defendant.

On July 2, 1963, decedent consulted D Hantsoo. D Hantsoo administered a tetanus toxoid by injection.

On or about July 19, 1963, decedent was admitted to Casualty Hospital, where she died on July 24, 1963.

CIVIL ACTION NO. 1776-64:

PLAINTIFF ASSERTS that decedent, a business invitee in D Safeway's Store at 12 Seventh St., N.E., in the District of Columbia, while shopping, placed certain items in a shopping cart owned by D Safeway and provided by said D for use of its customers; that while she was placing certain items in the cart, which was constructed of heavy gauge wire or steel, a portion of heavy gauge wire which had broken loose from its original position on the cart entered decedent's

right arm, inflicting deep lacerations; that D Safeway knew or should have known of the defective condition of the shopping cart; that decedent's injury was caused by the following negligence of D Safeway Stores, Inc.:

Failure to inspect its equipment, namely, shopping cart, for latent and patent defects

Failure to remove said defective cart from an area where it would be used by customers

---

NOTE: At pretrial, P sought to assert that D Safeway, upon receiving knowledge of decedent's injuries, through its agents and servants, was negligent in that it failed to render proper and complete first aid treatment to decedent, a task it had undertaken to perform; that D was negligent in:

Failing to properly cleanse the wound

Wiping decedent's arm with butcher's apron.

DEFENDANT OBJECTED TO THIS AS AN AMENDMENT TO THE COMPLAINT, TO WHICH IT DID NOT CONSENT. THE EXAMINER SUSTAINED DEFENDANT'S OBJECTION AND DENIED PLAINTIFF'S REQUEST FOR LEAVE TO AMEND TO MAKE SUCH ALLEGATION.

PERSONAL INJURIES:

Severe lacerations on right arm

Death following treatment by Dr. Leonard J. Hantsoo

Decedent was 63 years of age at the time of her death, employed as a baby-sitter part time, at about $15 a week.

Surviving heirs-at-law and next of kin:

Daughter - Betty Ann Zimmerman (plaintiff), aged

SPECIAL DAMAGES:

Dr. Leonard J. Hantsoo		$ 54.00
Casualty Hospital		266.15
Funeral Expenses:		
J. William Lee's Sons Co. Funeral Home	$800.58	
Swicegood Funeral Home	360.00	
W. D. Rowe Co., Inc.	55.00	1,215.58
Loss of earnings (baby sitter, 3 weeks at $15)		45.00
Total Special Damages		$1,520.73

Under the wrongful death action P claims the special damages and loss to the surviving heirs-at-law and next of kin.

In the survival action, P claims damages for the personal injuries, except for pain and suffering.

DEFENDANT SAFEWAY STORES denies all allegations of negligence on its part, either in causing the July 1, 1963 incident in its grocery store allegedly sustained by decedent, or that her death on July 24, 1963 was caused by said incident.

Defendant further asserts that if P's decedent was injured or damaged as alleged, her injuries and damages were caused by her sole or contributory negligence in failing to see and avoid the wire which it is claimed injured her.

Defendant denies that P sustained injuries and damages of the nature and to the extent alleged as the result of the incident in its store.

C.A. No. 1777-64

PLAINTIFF alleges that following her injury in the Safeway Store, decedent, on or about July 2, 1963, went to the office of D Dr. Leonard J. Hantsoo for treatment of the injuries received; that D Hantsoo, without a full and proper examination, gave decedent a tetanus toxoid injection and/or administered antibiotics, which caused a severe reaction in decedent's system, when in the exercise of reasonable care D doctor knew, or should have known, that decedent

was allergic to the injection; that D doctor failed to properly attend decedent after he became or should have become aware of decedent's physical condition; that as the result of D Hantsoo's following negligence, solely or in concurrence with the negligence of D Safeway, decedent died on July 24, 1963:

Failure to properly cleanse and treat decedent's wound

Failure to test decedent for possible allergy to tetanus toxoid injection and/or antibiotics administered

Failure to promptly and properly attend decedent during her last illness in that:

(a) he failed to properly check under decedent's bandage to see whether there was infection.

PERSONAL INJURIES:

Death of decedent on July 24, 1963

Allergic reaction to shot or antibiotics administered by D, accompanied by swelling of arm, headaches and dizziness

SPECIAL DAMAGES:

Same as recited at page 3 hereof, EXCEPT for bill of Dr. Hantsoo.

DEFENDANT HANTSOO denies all allegations of negligence on his part, and asserts that the medical treatment, care and examinations which he administered to decedent were without fault, neglect or failure of any kind, and were in accord with good and approved medical practice in the District of Columbia at the time in question for the conditions presented. D Hantsoo asserts that the condition for which decedent was hospitalized and which ultimately caused her death, was in no way caused by, aggravated by or in any way brought about by any act of omission or commission on the part of D Hantsoo, but said condition and decedent's death were the result of physical ailments and/or disease from which she suffered.

D Hantsoo further contends that the action is barred by the statute of limitations, D.C. Code §16-1202, in that it was not brought

in the name of the personal representative of deceased within one year after the death of the party injured, and D Hantsoo asks dismissal of the action.

STIPULATIONS:

Facts under "UNDISPUTED FACTS":

It is stipulated that the following may be admitted without formal proof of authenticity, subject to all other objections:

H.E.W. Mortality Table

Hospital records

Death Certificate -(D Safeway's No. 1)

Plaintiff's PT Exhibits:

No. 1 - hospital bill

No. 2 - bill of William Lee's Sons Co.

No. 3 - bill of W. D. Rose Co.

No. 4 and 5 - receipts of Swicegood Funeral Home

No. 6 - bill of Dr. Hantsoo

Any other documents initialled by all counsel prior to trial.

Counsel agree to exchange within one week copies of all medical reports to date not heretofore exchanged, if any, and to exchange promptly and prior to trial any additional medical reports which may be obtained.

Counsel for P agrees to furnish counsel for Ds within one week the names and addresses of all witnesses known to him, including experts, exclusive of impeachment witnesses, filing a copy of said list with the Clerk of the Court. Said list shall designate those expert witnesses upon whom P proposes to rely to prove (a) that decedent's death was caused in whole or in part by the alleged injury at the Safeway Store, and (b) that decedent's death was caused in whole or in part by the treatment rendered or failed to be rendered by D Hantsoo.

It is further stipulated that, if desired, Ds may take the deposition of said experts to be designated by P, as soon as practicable after receipt of said list, and that within one week after receipt of a report or transcript of an expert in behalf of plaintiff connecting Ds'

alleged negligence with decedent's death, Ds shall furnish the names of their expert witnesses to counsel for P, filing a witness list with the Clerk.

Counsel for D Safeway states that the following witnesses are now known to it:

Elmer H. Miller	412 Barton St., Arlington, Va.
Gilbert J. Perkey	9600 Underwood St. Seabrook, Maryland
Dr. Leonard J. Hantsoo	4119 Woodbury St. Hyattsville, Md.

Counsel for D Hantsoo states that he knows of no additional witnesses except that D may present one or two expert witnesses, to be designated as set forth above.

The Examiner requested counsel for D Safeway to produce the alleged defective cart at the trial if it is still in D Safeway's possession. Counsel for Safeway stated that it is not.

Counsel for Ds agree that P may take the depositions of their experts, if any, after they are designated in reply to P's expert witness list.

The Examiner has requested counsel to come to the trial with the maximum authority to settle the case which will be allowed them by their principals.

NO TRIAL BEFORE MAY 16, 1967

TRIAL ATTORNEYS: For P - Karl G. Feissner
For D Safeway - Frank F. Roberson
For D Hantsoo - J. Harry Welch

ASSISTANT PRETRIAL EXAMINER

/s/ Karl G. Feissner — Counsel for Plaintiff

/s/ Frank F. Roberson — Counsel for D Safeway

/s/ J. Harry Welch — Counsel for D Hantsoo

Form No. 55

EVID

In the United States District Court for the District of Columbia
holding a Probate Court

District of Columbia,

to wit:

The United States of America

To all persons to whom these presents shall come

Greeting:

Know ye, That on the 25th day of February A. D., 19 6-, Administration of all the money, goods, chattels, rights and credits of Bessie Lee Jones late of the District of Columbia deceased, was, by the United States District Court for the District of Columbia, holding a Probate Court, aforesaid, granted and committed unto Betty Ann Zimmerman and : who, as Administrat rix of the Estate of the said deceased, first executed an undertaking to the United States, with good and sufficient security approved by the said Court, in the penalty of One Thousand - - - - Dollars, conditioned for the faithful performance of her trust,

and took the oath prescribed and required by law; and whose appointment is unrevoked and still in force.

Witness, the Honorable Matthew F. McGuire, Chief Judge of said Court, this 25th day of February A. D. 19 6-.

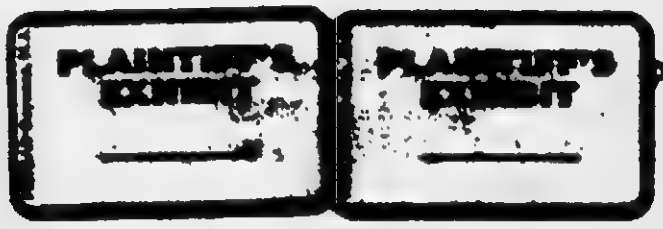
Attest:

Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

COPY

LEONHARD J. HANTSOO, M. D.
701 MARYLAND AVENUE, N. E.
WASHINGTON 2, D. C.
TELEPHONE LINCOLN 6-6671

November 4, 1963.



pany

Re: Bessie Lee Junes
B 409857

This is to certify that Mrs. Bessie Lee Junes was under my professional care for treatment of her injured right forearm.

Mrs. Bessie Lee Junes came to my office on July 2,1963 for treatment of a laceration on her right forearm. She stated that she injured her right forearm on a sharp end of a wire on a cart in a Safeway store on July 1, 1963.

There was an inflamed (infected) laceration on her right forearm. The laceration was about 3 centimetrs long with uneven edges. After debridement a bandage with an antibiotic was applied. Despite the used antibiotic the patient developed a dermatitis on her right arm with lymphadenitis and fever. The patients condition improved slowly and the laceration healed.

On July 21,1963 the patient had a CVA and she was admitted to Casualty Hospital, where she died on July 24,1963. The death was caused by thrombosis of an artery in the brain.

Leonhard J.Hantsoo, M.D.

EXCERPTS FROM DEPOSITION OF
GILBERT JACKSON PERKEY

1 Washington, D. C.
Monday, June 7, 1965

* * * * *

3 GILBERT JACKSON PERKEY,

a witness, was called for examination by counsel for the plaintiff and, having been first duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. FEISSNER:

Q. Would you give us your full name, please? A. Gilbert Jackson Perkey.

Q. Where do you live, sir? A. 9600 Underwood Street, Seabrook, Maryland.

Q. Where are you presently employed? A. Safeway Stores, Incorporated.

Q. Where? A. Number 12, Seventh Street, Northeast.

Q. What is your position or function there? A. Manager.

Q. What was your position in July of 1963? A. Same.

Q. Referring to the date on or about July 1, 1963, did you have occasion to know or reason to know that a woman by the name of Bessie Junes was in your store? A. Yes.

Q. Had you known Mrs. Junes prior to this time? When I say

4 "this time", I am referring to July of 1963. A. Yes.

Q. Had you known her enough so you recognized her? A. Yes.

Q. How did you know her? A. As a customer.

Q. Greeting her when she comes in, so to speak? A. Right.

Q. How long had she been a customer with Safeway there, sir? A. She had been a customer of mine for at that time I would say six years.

* * * * *

5 Q. Can you describe her? A. She was I would say a medium built, elderly woman, about 60-65. Probably grayish hair.

Q. When you say medium built, you mean 5-2, 5-3, something like that? A. Something like that.

Q. Was there anything unusual about her appearance? A. No.

Q. When did you first have knowledge of the fact that she was in your store, sir? A. When the accident occurred.

Q. You hadn't seen her prior to that — A. No.

Q. — that you recall? A. No, I hadn't.

Q. What drew your attention to the fact of an accident? A. She came to me — I was checking — and told me that she had stuck a wire in her arm, so I immediately came out of the check stand and took her behind the meat counter, where I got Mr. Miller, the meat butcher, to take care of her arm.

* * * * *

6 Q. Did you discover what she had cut her hand on? A. Yes.

Q. What was it? A. It was a wire sticking up in a baskart.

7 Q. One of the little carts we use when we go into your store? A. Right.

Q. Where was the wire sticking from? The bottom, side, or where? A. Top of the baskart.

Q. When you say the top, do you mean the top where we have the handle or up front of the cart where you put the coke bottles? A. In the back of the cart near the handle.

Q. Was this in the part which swings forward? You know, there is a part — A. Oh, this particular cart don't have the extra seat, you know, for —

Q. Right. For the children. A. Children, right.

* * * * *

Q. The wire was near where the handle was; is that right, sir? A. Right.

Q. Where you have your right and left hand, would you tell us whether the wire was to the right of the right hand or to the right of the left? A. As far as I remember, to the right.

8 Q. Right of what, sir? A. Right hand.

Q. To the outside of her right hand? A. Right.

Q. Was the wire sticking up to the bar where the area was that you would grasp the cart? A. No.

MR. BELSON: I am not clear on that question. You mean are you talking about the bar by which you grab the cart?

MR. FEISSNER: Right.

MR. BELSON: The handle you use to push?

MR. FEISSNER: Right.

MR. BELSON: All right.

BY MR. FEISSNER:

Q. How far was the wire, the exposed wire, from the handle that you use to push with? A. I would say four or five inches.

Q. Down? A. Down below that.

Q. Did you ascertain whether the wire had come loose or had snapped, broken, or had been forced, or what? What was the appearance of this particular wire? A. The wire had come loose.

Q. Was the wire soldered, or had it just broken? A. It had
9 just broken.

Q. In other words, something had caused the wire itself to break? A. Right.

Q. To your recollection, when was the last time anyone in your store checked those carts to see if there was any broken wires in the baskets? A. We check them for cleanliness practically once a month, and also for breakage, for damaged parts.

Q. When was the last time these were checked? A. I would say two weeks prior to that.

Q. Would you be reasonably assured that this cart was one of those that was checked two weeks previously? A. Yes, sir.

Q. What did you do with this cart after you had ascertained what had caused the difficulty? A. I took the cart myself and put it in the back room.

Q. What has happened to it since that time? A. I repaired the cart myself by taking the wire off.

Q. How did you repair it, sir? A. By breaking the loose wire off and filing the other part down where it wouldn't —

Q. You took the loose wire out and filed it down, is that the idea? A. Where I broke the loose wire from the other piece, I filed that
10 down; that made the baskart all right to use.

* * * * *

Q. Sir, at the time that Mrs. Junes came to your attention when you were at your checkout counter, what was the condition of the area that she had had the wound in? Profuse bleeding? A scratch? How would you describe the general condition of the area? A. To me it
11 looked like more or less a scratch which just nicked the skin.

* * * * *

12 Q. Mr. Perkey, where was the cut on Mrs. Junes? Can you tell us by reference to your body? A. I think it was on the right arm (indicating).

Q. Above the wrist? A. Above the wrist.

Q. But below the elbow? A. Right.

13 Q. Would we be correct to say maybe between an inch and a half or three inches above the wrist?

MR. BELSON: I will let him answer that, if he can. He just said it would be hard to say.

BY MR. FEISSNER:

Q. If you can. A. I can't remember.

Q. Could you give us in your own — A. It was in that area.

Q. Okay. I am just trying to get a general idea, sir. You also indicated it was on the inside of the arm rather than the outside? A. Yes, sir.

Q. This particular wire, Mr. Perkey, does this wire run all the way from the bottom of the cart up to where the handle is? A. Not all the way from the bottom.

Q. It doesn't? It starts in the middle somewhere? A. Starts in the middle.

* * * * *

14 Q. Sir, when Mrs. Junes was in the store and came up to where you were checking out, did she have any food or groceries in her basket? A. When she came to me, she didn't have anything. The baskart was where she had the accident.

Q. In other words, when she went to get the baskart to do shopping, is that the idea? A. The baskart was where she had made this purchase, which was in front of the meat counter, that is where she

15 went to put a pound of hotdogs I think into the baskart and stuck her hand on it.

Q. A pound of hotdogs? A. Yes.

Q. And when she went to put them in the cart was when she cut her hand? A. Right.

Q. Where did you get that information from, sir? A. From her.

* * * * *

16 Q. Is there anything distinguishing this one wire from all of the others except the fact it was loose? A. No.

Q. Was the end of it sharp? A. A little, yes, sir.

Q. To your best recollection, Mr. Perkey, what is the frequency with which you find baskets in your store having loose wires in them? A. Very seldom do we find them that way. I have been with the company now for about 19 years and as far as I can remember, it has only happened two or three times to my knowledge.

Q. But you do inspect them every month? A. Yes, sir.

Q. Is this a policy of you, the store manager, or a policy of

17 Safeway? A. Well, I would say both.

Q. I mean, does it come down from upstairs that you will do it once a month? A. Right. Right.

Q. Mr. Perkey, when you were drawn to Mrs. Junes' attention, did you have any difficulty in seeing the loose wire with the semi-sharp end? A. No.

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EXCERPTS FROM DEPOSITION OF
DR. LEONARD J. HANTSOO

1 Washington, D. C.

Wednesday, January 27, 1965

* * * * *

3 DR. LEONARD J. HANTSOO,

a witness in the above-entitled cause, called for examination by counsel for the plaintiff, and having been first duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. FEISSNER:

Q. Sir, would you state your full name, please? A. Leonard J. Hantsoo.

Q. Are you a physician and doctor of medicine, sir? A. Yes.

Q. Briefly, sir, where did you receive your education? Where did you get your diploma? A. From Estonia.

Q. What medical school did you attend? A. Medical School of Tartu.

Q. Are you a licensed physician in the District of Columbia? A. Yes.

Q. Do you recall when you were licensed, to your best recollection? A. On May 27, 1952.

4 Q. What is your present residence address, sir? A. 4119 Woodbury Street, Hyattsville, Maryland.

Q. Woodbury? A. Yes.

Q. Where is your present office, sir? A. 701 Maryland Avenue, Northeast, Washington, D. C.

Q. Do you have any specialty, sir? A. I am a surgeon.

Q. You are a surgeon? A. General surgeon.

Q. General surgeon? A. Yes.

Q. Do you have any membership in any professional societies, sir? A. Yes, the medical society of the District of Columbia, AMA.

Q. Are you recognized or have any fellowships in any board of surgeons, sir? A. No.

Q. Sir, did you have occasion to treat one, Bessie Junes? A. Yes.

5 Q. When did she first, to your best recollection, become a patient of yours? A. I have to see, get the records.

Q. You go ahead, sir. A. First, I see her on February 9, 1959.

Q. Had she come to you with any degree of regularity subsequent to that? A. No, very irregular.

Q. What did she see you for at that time, sir? A. She had upper respiratory infection, was coughing.

Q. When was the next time she saw you, sir? A. On September 20, 1960.

Q. What was the nature of that visit, sir? A. Then she had, also, a bronchitis and she had high blood pressure.

Q. When was the next time she saw you, sir? A. And it was on 4/14/61, sore throat, and I saw her at her home. It was a house call.

Q. Sir, up until this period of time, 4/14/61, had you taken any medical history from Mrs. Junes? A. No, she only called when she was really bad off and usually, it was a house call.

Q. Were these previous visits you mentioned house calls,

6 doctor? A. These previous visits, they were at my office.

Q. Did I understand you to say, sir, that she was quite ill when she would finally come to see you? A. Yes, and she was again in May 22, 1962. She was complaining about weakness and drowsiness, had high blood pressure.

Q. What did you prescribe on that occasion, sir? A. I gave her Capla tablets and gave her a prescription for Rauerax.

Q. Would you spell that, sir? A. R-A-U-E-R-A-X.

Q. That is to lower the blood pressure, sir? A. Yes, and Capla C-A-P-L-A tablets.

Q. What does that mean, sir? A. That is the name of the tablets.

Q. Oh, Capla, not the amount you were referring to, sir?
A. No. I gave her 24 tablets, a week's supply.

Q. When did you next see Mrs. Junes in a professional capacity, sir? A. Then I saw her again on May 28, 1962. Gave her the same prescription again, and then I saw her again on June 11, 1962, again,
7 for high blood pressure.

Q. When did you see her after that, sir? A. Then on February 4, 1963. It was a house call. She had bronchitis again with high temperature.

Q. What did you prescribe on that occasion? A. She had high blood pressure. I gave her, again, Rauerax and I gave her some expectorant.

Q. During the period of time when you first treated her until this incident of treatment on February 4, 1963, had you ever given her any injections, such as penicillin or aureomycin for bronchial infections? A. I never gave her penicillin. She said she was allergic to penicillin and I didn't want to try it.

MR. WELCH: He asked if you ever gave her any kind of an injection of an antibiotic.

THE WITNESS: I gave her once an injection of chloromycetin on one house call.

BY MR. FEISSNER:

Q. When was that, sir? A. That was April 14, 1961.

Q. When was it she told you that she was allergic to penicillin, if you recall, sir? A. I can't recall.

8 Q. I am just consulting your best recollection, sir. After February 4, 1963, when did you see her again, doctor? A. Then I saw her again on July 2, 1963.

Q. Where did you see her, sir, on that occasion? A. She came to my office.

Q. What history did she give you at that time? A. She said that she injured, or scratched, her right forearm on the cart at the Safeway Store, and she was complaining about weakness and she had

a superficial laceration on the right forearm.

Q. What treatment — A. And she had high blood pressure and I gave her injection of tetanus toxoid and put her a bandage on with an antibiotic ointment and gave her tablets for her high blood pressure.

Q. Doctor, prior to this occasion, had you ever given her tetanus before? A. No.

Q. Did you inquire of her whether or not she had any known allergy to tetanus? A. No.

Q. When did you see her again, then, after this occasion on
9 July 2, sir? A. Then I saw her twice on the 5th of July, 1963 at her home.

Q. What was her condition at that time, sir? Let me try again. What time was it you saw her on the 5th of July? Was it an unusual hour, sir? A. I have no time. I guess it was in the morning, afternoon of it. It was twice.

Q. You were there twice on the same day? A. Yes.

Q. By the way, sir, the notes from which you are reading, were these made in July of 1963? A. Yes.

Q. They were? A. Yes.

Q. For what did you see her the first time on July 5, 1963?

MR. WELCH: I don't think he heard the question.

BY MR. FEISSNER:

Q. The first time you went there — you said you went twice on the 5th of July. The first time, what was the purpose of your call? A. She called me, feels bad, looks like so. I don't have any marks
10 here by it, just two house calls. On the second time, I changed her bandage. So, the first time, I guess I went —

MR. WELCH: Don't guess. If you have a recollection as to what you did, you may answer.

THE WITNESS: I didn't have my material with me to change the bandage. That is the thing. Then I went back to change the bandage.

BY MR. FEISSNER:

Q. When you say you went the first time, do you recall what her condition was? A. I don't recall.

Q. When you went the first time, did you perform any diagnostic examination or tests on her? A. I don't recollect.

Q. Do you carry a little, black bag with you, doctor, like most doctors do? A. Yes.

Q. Did you have your little, black bag when you went the first time? A. Yes.

Q. Do you recall anything about her color or pallor the first time you went there? A. I don't recollect.

11 Q. When you came back the second time, sir, was it in response to her call or because of your own feeling you should see her again? A. I wanted to change the bandage.

Q. When you saw her the first time on the 5th, you felt there may be reason to change the bandage later that day? A. Yes.

Q. When she left you on the 2nd of July, had there been any pre-arrangement for her to return to see you? A. I don't recollect that.

Q. What caused you to go back and change the bandage the second time on the 5th? I mean, what was the reason for going back to change the bandage? A. Just to change the bandage. It was about time to change the bandage. You can't keep the bandage on two or three weeks. You have to change every couple of days.

Q. If I remember correctly, doctor, you said earlier this was a superficial wound. Do I assume correctly when I assume there were no stitches taken? A. No stitches.

Q. How big a bandage was this, sir? A. I can't say.

12 Q. When you went there the second time, then, did you change the bandage, doctor? A. Yes.

Q. Was there anything unusual about her condition at that time? A. Nothing unusual.

Q. When did you see her after the second time on the 5th of July? A. On the 5th.

Q. After the 5th, sir? A. On the 8th, the 8th of July.

Q. Did you see her at your office or her home? A. No, at her home.

Q. Had she called you, sir? A. I can't say that she call or did I call myself. I don't know.

Q. What was her condition when you went there on the 8th of July? A. I just changed the bandage. Nothing else is written here.

Q. Do you recall doing anything else, doctor? A. No.

13 Q. Do you recall giving her any medication? A. No signs about that.

Q. You have no independent recollection, sir? A. No.

Q. When did you see her after the 8th? A. On the 12th.

Q. What did you do then, sir? A. Again, to change the bandage.

Q. Well, doctor, did you do anything besides change the bandage on the 12th? A. I don't recollect.

Q. You have told us now about four occasions, sir, from the time she was injured, that you went to change the bandage on this wound. A. Yes.

Q. Was there something unusual about the wound that required that the bandage be changed four times in about 10 or 11 days, sir? A. The bandage was changed after three days, like a usual bandage change is when you have an infected wound. It starts to smell, if you left it longer.

Q. Was the wound infected? A. Yes.

14 Q. When did you first determine when the wound was infected? A. The first time when she came in.

Q. What was the appearance or condition that led you to the conclusion it was infected? Why did you arrive at the conclusion the wound was infected? A. There were signs of inflammation.

Q. In other words, around the wound itself, it was red and inflamed? A. Yes.

Q. And did this inflammation increase or decrease from the 2nd of July? A. It decreased all the time.

Q. What was that? A. It decreased all the time.

Q. It decreased all the time? A. Yes.

Q. When did you see her after the 12th, sir? A. On the 15th.

Q. What did you do on that occasion? A. Again, changed the bandage.

Q. Did you do anything else you recall? A. I don't recall anything else.

15 Q. When did you see her after that, sir? A. Then on the 18th.

Q. Where did you see her on the 18th? A. At her home to change the bandage.

Q. Did you do anything else, sir? A. I don't know. I don't recollect.

Q. Where did you see her after that, sir? A. Then I saw her again on the 21st of July at Casualty Hospital.

Q. Had you known she was taken to Casualty Hospital, sir? A. I was called at her home and it was said that she fell down, passed out and when I went home, she was gone, already to the hospital. That was a Sunday morning.

Q. Do you recall who called you, doctor? A. No, I don't recall.

Q. When you saw her at Casualty Hospital, did you have any reason to suspect what caused her to pass out at the house? A. Yes, it looked like it is cerebral vascular accident.

Q. A form of stroke? A. Yes.

Q. Would that be accurate, doctor? A. Yes.

16 Q. What led you to that conclusion when you arrived? A. Outward appearances, like she was —

Q. Could you be more specific, sir. Why did you come to the conclusion that she had a CVA? Was there anything, other than her appearance, that led you to this conclusion.

MR. WELCH: At what point? When he first arrived?

MR. FEISSNER: Yes.

THE WITNESS: She couldn't move her limbs. I don't remember which side she couldn't move and she was unconscious, didn't respond to questions.

BY MR. FEISSNER:

Q. When she didn't respond to questions, doctor, were her eyes open or closed? A. I don't remember.

Q. Were any tests run under your direction at Casualty Hospital to determine what happened to her? A. Yes, the usual tests.

Q. What were the usual tests that were run? A. Blood examinations, urine examinations.

Q. What conclusion did you come to after reviewing the laboratory and blood examinations, sir? A. According to the clinical picture, I came to the conclusion that it must have been a thrombosis, not puncture.

17 Q. In the head, sir? A. In the brain.

Q. When did you see her after that? A. I saw her after that every day until she died.

* * * * *

18 Q. Doctor, during the period of your treatment of Mrs. Junes — that is, from the time she was injured until she went into the hospital — had you given her, as medical or therapeutic advice, the advice that she should get up from the bed and move around the house so she wouldn't become weak? A. I guess I told her.

Q. Well, in fact, sir? A. I am not quite sure.

Q. Had she been in bed during this period from the 2nd to the 12th? Was she a bed patient, in other words, at her home? A. When

19 I went at her home, she was usually in bed.

Q. Well, do you recall when you went on the 5th of July, when you went on two occasions, was she in bed? Was she actually a bedridden person, sir? A. I can't recollect. I don't know.

Q. You have no recollection, sir? A. No.

Q. Doctor, regarding the period of time when Mrs. Junes was taken to the hospital, were you called by the members of the family and advised that she had apparently fallen down in a faint at the house? A. The day she was taken to the hospital, I was called at my home in the morning that she had fallen down and is unconscious.

Q. Do you recall what advice you gave them? A. I said that I would be over and I would see.

Q. How long was it before you went over? A. I don't recall. That was in the morning. I was sleeping when they called me. I had to dress myself and to drive over.

Q. And when you drove over — A. She was gone, already, to the hospital.

Q. Under your direction, Doctor, during her course in hospital,
20 was this woman given insulin? A. Yes.

Q. Why was she given insulin? A. That was because the blood sugar was higher than normal.

Q. Does insulin, as a therapeutic device, have any relation to the stroke, sir? A. Yes, it may have in the brain hemorrhage. The blood sugar was high.

Q. In this particular case, the laboratory tests showed the blood sugar was high? A. It shows it is higher and then it is advisable to give insulin to keep sugar in blood, not to let it go out with urine.

Q. Doctor, do you recall if, at any time, you advised the people at Casualty Hospital that you had given this woman a tetanus shot? In other words, was it on her chart, as a result of information from you that she had had a tetanus shot? A. I haven't given — what do you mean by tetanus shot? There are two distinctive kinds. One is tetanus antitoxin and one is tetanus toxoid. They are completely different in their action.

21 Q. I am speaking of the tetanus shot on the 2nd of July when she first came to you. What kind of shot was that? A. That was toxoid.

Q. Did you ever give her any other shot, other than that one? A. No.

Q. Did you advise the people at Casualty or was it on her chart that she had received a tetanus shot from you? A. I don't remember.

Q. Doctor, I am just having a little difficulty on one point, if I may, sir. On the Sunday morning that Mrs. Junes was taken to the

hospital when you were called at home, do you recall, to your best recollection, what period of time elapsed from the time you were called until you came to her house and she wasn't there? A. I can't say.

Q. Did you go directly to the hospital from her house? A. No, I went to her house first.

Q. No, I mean, from her house, did you go directly to the hospital? A. Yes.

Q. Do you recall what time you got to the hospital? A. I don't remember.

22 Q. At the time that she went in the hospital, doctor, had you completely removed the bandages from her arm? A. I don't remember. I don't remember whether it was completely removed but it was healed all right.

Q. I am sorry? A. The wound was healed.

Q. The wound was healed at the time she went in the hospital? A. Yes.

Q. Was there any inflammation there at all, as you recall? A. I don't recall any.

Q. Doctor, and if you don't understand the term I use, maybe I can tell it to you in German — during the course of treatment from July 2nd to July 12th, do you understand the term "eventful" or "uneventful"? In other words, did her treatment correspond in a manner that was satisfactory, to your thinking? A. It was very slow.

Q. Beyond being slow, was there anything unusual? A. That was completely in accordance with her condition. She was a very overweight and hypertension and usually takes more time to heal anything in these people than in usual young people.

23 Q. That is understandable, sir. Did any unusual conditions develop during this ten-day period from the 2nd of July until the 21st of July, the Sunday morning that she was taken to the hospital. I mean, did anything unusual develop about her arm? A. No, nothing unusual. So much as I recall, she was complaining about the place hurting where the needle was given, but that is completely natural. When

anyone has had a flu shot, it hurts, too, for a whole week.

Q. Doctor, did this lady have an autopsy? A. I don't know, in my opinion.

Q. I mean, did you know? A. No.

Q. Did the family ask you to perform an autopsy? A. No.

Q. Doctor, going all the way back to the time she first came in to see you with this wound she had claimed she had sustained at the Safeway Store, will you tell me whether it was a puncture or what type of wound it was? A. Like a scratch with some sharp object.

Q. Like a cat's fingernail, so to speak? A. Yes.

24 Q. How long was it, sir? A. I don't remember.

Q. I am trying to understand. A. I didn't write here down how long it was.

Q. To what layer did this scratch go, sir? I mean, was it superficial? A. Only the skin.

Q. Only the skin, the epidermal layer, only? A. Yes, some of the derma, too, but not the subcutaneous tissue.

Q. Doctor, was this an unusual thing for this injury, or an injury like this, to become inflamed? A. That is nothing unusual with a scratch on a cart in the store. It is usually dirty on it.

* * * * *

EXAMINATION BY COUNSEL FOR DEFENDANT

BY MR. CONNOLLY:

Q. Doctor, at any time between July 2, 1963 and the death of Mrs. Junes, did you administer any penicillin to her? A. No.

25 Q. You mentioned that when you applied the bandage on her first visit, you also administered an antibiotic ointment. Can you recall what kind it was? A. Neosborine ointment.

Q. How do you spell that? A. N-E-O-S-B-O-R-I-N-E.

Q. It was on the same day that you administered the tetanus toxoid injection? A. Yes.

Q. Did she experience any shock or similar reaction? A. No, she was not in shock.

Q. I mean after the injection? A. No.

Q. Was there any reaction on her part that you were aware of to the injection? A. No, it was a usual injection.

Q. It was a usual injection? A. Yes.

Q. I believe you said that you gave her on that same occasion some tablets for the treatment of her high blood pressure condition.

A. Yes.

26 Q. Can you recall what kind of tablets you gave her on that day?

A. Unitensin R tablets.

Q. How do you spell that? A. U-N-I-T-E-N-S-I-N, Capital R tablets.

Q. That is the only kind you gave her? A. Yes.

Q. Did you have them there in your office or did you give her a prescription? A. I gave her the tablets.

Q. What dosage did you tell her to use? A. These are unitensin R. The dosage — that is a long-acting tablet that is only one size.

Q. What is the dosage, one a day? A. One a day, yes. No, twice a day, one every 12 hours.

Q. Did you prescribe any other kind of medicine on July 2nd.

A. No.

Q. The next time you saw her was on July 5th at her home, is that correct? A. Yes.

Q. Will you tell me all the signs and symptoms you became

27 aware of on that day? A. Signs?

Q. What did she complain of that day and what physical signs did she show? A. I don't have any marks here about it. I don't know.

Q. Did she give any history of having lost consciousness?

A. No.

Q. Had she experienced a CVA between the time you first saw her and July 5th? A. No.

* * * * *

Q. Now, getting down to the 18th of July, was that a visit at her home again? A. At her home, yes.

Q. Did you change the bandage again that day? A. I changed the bandage.

Q. Can you recall what the condition of her skin wound was?

28 A. I don't recall.

Q. Was that wound cleared up before the time she entered the hospital? A. I don't recall it.

Q. Can you recall whether the laceration had healed over by the time she entered the hospital? A. I don't recall.

MR. CONNOLLY: Off the record.

(Discussion off the record.)

BY MR. CONNOLLY:

Q. Do you have any material among your notes which would refresh your recollection as to whether she had experienced a healing of the laceration? A. No, there is nothing written about this. I changed the bandage on the 18th and it probably was not healed completely by this day, no.

Q. What about by the 21st? A. I don't know.

Q. Do you know whether she ever had informed you of an incident of passing out or losing consciousness any time before July 21st? A. No, I don't have it here.

* * * * *

32 Q. Was there any relationship, doctor, between the thrombosis which this lady had at the time of her death, and which apparently caused her death, and the scratch she received in the Safeway?

A. I didn't —

Q. Was there any relationship between the thrombosis which caused her death and the scratch she received in the Safeway? A. I don't think it — I don't find any relationship.

MR. CONNOLLY: I have nothing further.

MR. FEISSNER: I have just two questions.

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. FEISSNER:

Q. Doctor, what was her blood pressure on June 2nd of '63?

June 2nd?

Q. July 2nd? A. 216 over 110.

Q. Did you take her blood pressure at any time after that?

A. I don't remember. I guess I took it, but I don't remember.

* * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.
November 14, 1967

The above entitled matter came on for further trial before the HONORABLE ALBERT L. STEPHENS, United States District Judge for the District of Columbia, commencing at 10:00 a.m.

* * * * *

3 BETTY ANN ZIMMERMAN

was called as a witness, and after being duly sworn upon oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FEISSNER:

Q. What is your name, please? A. Betty Ann Zimmerman.

Q. Who was Mrs. Junes? A. My mother.

Q. Directing your attention to the month of July 1963, where did your mother reside? A. 516 A Street, Northeast.

Q. In what city? A. Washington, D. C.

Q. At the first of July, 1963, your mother was living at that address? A. Yes.

Q. And who was she living with? A. My brother.

Q. And what is his name? A. Wilbur.

Q. What is his age? A. Twenty-nine.

4 Q. And yours? A. Twenty-seven.

Q. Referring to the first of July, 1963, was your mother employed anywhere? A. Yes.

Q. How was she employed? A. As a baby sitter.

Q. Did she have any earnings from this? A. Yes.

Q. What were her earnings? A. Ten dollars a week.

Q. Any other? A. Social security, $47.50 a month. She took care of my brother.

Q. Is there any reason for that? A. He is mentally retarded.

Q. Where does your brother live now? A. With me and my husband.

Q. How does he spend his time at the present? A. Watching television.

Q. Anything in particular? A. Cartoons.

Q. And is he employed? A. Yes.

5 Q. How is he employed? A. He is a painter's helper.

Q. With whom? A. My husband.

Q. Your husband is in some type of painting contracting business? A. Yes.

Q. Directing your attention to the first of July of 1963, where were you living at that time? A. 6320-14th Street, Northwest.

Q. Where is that? A. Washington, D. C.

Q. Did you with any frequency visit your mother? A. Yes.

Q. And with about what frequency? A. Just about every day.

Q. Why did you see your mother almost daily? A. We were very close.

Q. Did there come a time when your mother brought to your attention that anything unusual had occurred? A. Yes.

Q. When was that? A. A few days before the 4th of July.

Q. And what transpired? A. She called me at work and said she had been in the Safeway store and hurt herself.

6 Q. Where were you working? A. Capitol Radio Wholesalers.

Q. What did you do upon receiving this notification? A. I went directly there after work.

Q. Where was that? A. At her home.

Q. On A Street? A. Yes.

Q. And did you observe your mother? A. Yes.

Q. Was there anything unusual about her? A. There was a wound on her arm where she got hurt in the Safeway.

Q. Would you describe what you observed? A. It was a puncture wound.

Q. Where was it? A. On the bottom part of her arm on the top part.

Q. Which arm? A. Her right arm.

Q. Would you explain to the court what you mean by top part of the bottom of the arm? You are referring approximately to midway between the elbow and the wrist on the top of the arm? A. Yes.

7 Q. What was there that you observed? A. A puncture wound.

Q. What was the condition of your mother's health at the time? A. Good.

Q. To your knowledge, did your mother have any disease? A. No.

Q. You visited her how often? A. At least four times a week.

Q. What was her daily routine prior to or a few days before the 4th of July? A. She baby sat every day.

Q. Where? A. I don't know where it was — on East Capitol Street, Northeast.

Q. What else was her routine insofar as her normal living was concerned? A. Housekeeping, grocery shopping.

Q. Was she able to do all these? A. Yes.

Q. To your knowledge, when was the last time your mother had seen a physician for any matter? A. To the best of my knowledge — I can't remember.

Q. As a result of this injury to your mother, to your knowledge

8 did she do anything? A. Yes.

Q. What did she do? A. She saw the doctor the following day.

Q. Do you know what doctor she saw? A. Dr. Hantsoo.

Q. Do you know Dr. Hantsoo? A. Yes.

Q. Could you identify him? A. Yes.

MR. FEISSNER: May the record reflect that the witness identified the defendant.

BY MR. FEISSNER:

Q. Thereafter, Mrs. Zimmerman, did you see your mother after she returned from the doctor? A. Yes.

Q. When did you see her? A. That evening.

Q. Was there anything unusual about her appearance at that time? A. She was nervous.

Q. Did there come a time when her condition changed? A. Yes.

Q. When was that? A. A couple of days later.

9 Q. What would that be? A. The fifth of July.

Q. Were you present at your mother's home on the fifth of July? A. Yes.

Q. What did you observe about your mother at that point? A. She was nauseated and had inflammation of the arm.

Q. Where in the arm was the inflammation? A. The top part, between the shoulder and the elbow.

Q. What do you mean by inflammation? A. It was swollen hard and red.

Q. And the condition of the lower part? A. That was red.

Q. What was your mother doing on the fifth of July? When were you there? A. Early morning.

Q. What was her routine at that time? A. She was in bed when I arrived.

Q. Was it because of the hour that she was in bed? A. No, because she was sick.

Q. How long did you stay? A. All day.

Q. And what did you observe about your mother that day? A. She was nauseated, weak and feverish.

Q. Did your mother get up and move about? A. No, very little.

Q. Was there any reason why you observed why she didn't get up and move about? A. She was very weak.

Q. Had you ever observed such a situation or condition in your mother before? A. No.

Q. Did anyone come to visit your mother on the 5th of July? A. Yes.

Q. Who came? A. Dr. Hantsoo.

Q. Do you know how many times he came? A. Twice.

Q. Do you know what he did? What did you observe? A. I was not in the room.

Q. What about thereafter? How did your mother's course proceed? A. She got worse.

Q. In what respect? A. She wasn't able to go alone to the rest room. She had to be helped. She was nauseated, weak and feverish.

Q. And what was the condition of her arm? A. It stayed red
11 and swollen and very hard.

Q. Where did it stay red, swollen and very hard? A. The upper part of her arm.

Q. What was the condition of the lower part of her arm? A. That was still slightly red.

Q. With what frequency did you see your mother after the 5th of July? A. Every evening.

Q. You had come from where? A. Work.

Q. You say every evening. Do you in fact mean every night? A. Yes.

Q. Did anyone stay with your mother during this period? A. My brother in the evenings and at night my aunt, Mrs. Margaret Idian.

Q. Did you have any occasion to speak with the physician attending your mother, Dr. Hantsoo, after the 5th of July, 1963? A. Yes.

Q. What were the occasions which you had to speak with Dr. Hantsoo? A. Telephone calls.

12 Q. When was the first one? A. Approximately two weeks after the 5th.

Q. What was the purpose of your calling? A. My mother became worse and I called him at home.

Q. Do you know when this was and the date? A. No, sir.

Q. Approximately two weeks? A. Yes.

Q. Up until that time had you had occasion to speak with Dr. Hantsoo or overhear any conversation he had? A. No.

Q. During the period of time from when your mother was injured, did there come a time when she went to the hospital? A. Yes.

Q. What was her condition when she went to the hospital?

A. She was unable to speak.

Q. How did you observe or come to know this? Were you at her home? A. No, I wasn't. My brother called me.

Q. And did you go see your mother? A. Yes.

Q. As a result of your seeing her what did you do? A. I called Dr. Hantsoo.

13 Q. And what transpired? A. He told me to be quiet around her. Not to bother her and he would come.

Q. Then what transpired? A. We waited and he hadn't shown up and after several calls to his home we called Casualty Hospital and they came and got her.

Q. Your mother was taken to Casualty Hospital. When your mother was taken to the hospital had she been visited by the doctor in response to the calls? A. Yes.

Q. I mean the day that you called the doctor? A. He came to the hospital. That is where she was when he saw her.

Q. Did he see her at home that morning in response to your call? A. No.

Q. Did you have any occasion to speak with your mother at that time? A. Yes.

Q. What transpired between you and your mother at the hospital?

A. She just told me she knew she was dying.

Q. Did she use those words? A. Yes.

Q. For what period of time was your mother in the hospital? A. Four days.

Q. Was there anything unusual about her arm at the time she went to the hospital? A. It was still swollen hard and red.

Q. In the upper or lower portion? A. Upper.

Q. What about the lower portion? A. To the best of my knowledge, it was the same way, still red.

Q. To your knowledge do you know how many times your mother was visited at her home by the doctor? A. No, I can't say for sure.

Q. What was the age of your mother in July of 1963? A. Sixty-four.

Q. Madam, at the time that your mother went into the hospital, was there any dressing on her arm? A. There was a Band-Aid.

Q. Where? A. On the lower part of her arm.

Q. Do you know who put that Band-Aid on? A. Dr. Hantsoo.

Q. It was still on her arm when she went to the hospital?

A. Yes.

Q. That is the lower portion? A. Yes.

Q. To your knowledge, Mrs. Zimmerman, in July of 1963, was your mother taking any medication? A. Not to my knowledge.

Q. Would you briefly describe her insofar as weight and height and give some composite picture? A. She was about 64 and weighed about 185 pounds.

Q. She was a heavy-set woman? A. Yes.

Q. Did she have any activities other than those you mentioned other than baby sitting and housekeeping? A. No.

MR. FEISSNER: I submit the witness, sir.

CROSS-EXAMINATION

BY MR. ROBERSON:

Q. Mrs. Zimmerman, you say that on the day that this incident occurred at the Safeway Store, you saw your mother in the evening? A. Yes, sir.

Q. About what time was it? A. Between 5:30 and 6:00.

Q. And when you got to her home, did she have a Band-Aid on?

16 A. Yes.

Q. Did you see the mark itself or did you just see the Band-Aid? A. I saw the mark.

Q. Was the mark itself less than an inch long? A. I can't say for sure.

Q. Approximately what was the length of it? A. It was about an inch.

Q. A Band-Aid covered the whole thing? A. Yes.

Q. Did you say that the mark on the arm was dirty when you saw it? A. Yes, sir.

Q. Did you clean it? A. No.

Q. Did your mother clean it? A. Not to my knowledge.

Q. How long were you there that evening? A. It was approximately 11:00 o'clock.

Q. You were there for some hours then? A. Yes.

Q. And during that time neither you nor your mother nor anyone else tried to clean the wound you said was dirty? A. No, sir.

Q. You said at that time your mother was in good health?

17 A. To the best of my knowledge.

Q. You know that since the 50s, sometime in 1950 your mother had been suffering from hypertension or high blood pressure?

A. Yes.

* * * * *

Q. You received a telephone call on the 21st of July, that was a Sunday morning. Wasn't that from your brother? A. Yes.

18 Q. And as a result of that you went over to see your mother?

A. Yes.

Q. Was she unconscious when you arrived there? A. Yes.

Q. You had been there the night before between 5:30 and 6:00 o'clock, hadn't you? A. Yes.

Q. And she was apparently all right at that time on the 20th of July, wasn't she? A. She wasn't all right, but there wasn't any need for us to stay there that evening.

Q. You remember having your deposition taken in this case, Mrs. Zimmerman, when you came to the lawyer's office and under oath you were asked questions about it and you answered under oath? A. Yes.

Q. This was on March 16, 1965, a couple of years ago. Do you remember these questions being asked and these answers being given to you on that occasion, referring to page 30. "Question: Had you seen her the night before at 5:30 or 6:00 o'clock? Answer: Yes. Question: Was she apparently all right that night? Answer: Yes."

19 Were those questions asked and did you answer that way? A. Yes.

Q. The mark on the top of her forearm, did that improve during the period between the first of July when the original accident occurred in the Safeway and Sunday the 21st of July when she was taken to the hospital? I am talking about the forearm. A. It was better.

Q. In other words, this mark, such as it was, had improved? Is that correct? A. Yes.

Q. By the time she went to the hospital was the mark on her forearm of normal color? A. No.

Q. Referring to pages 64 and 65 of the deposition you gave under oath, were these questions asked you and did you answer in this way? "Question: And was the actual point of the puncture or laceration still in any way sore? A. Answer: Yes. Question: Describe it to me in full. Answer: It was still there. It was not completely healed. Question: It was still opened? Answer: No, it was closed over. Question: Was it discolored? Answer: No. Question: It was normal color for the arm there? Answer: Yes. Question: The forearm was never swollen. Was it the lower arm? Answer: Somewhat swollen. Ques-

20 tion: That had gone away at the time she went to the hospital? Answer: At the time. Question: Had the swelling gone away by the

time she went to the hospital? Answer: Yes, it had gone down. Question: Had it gone away? Answer: Not completely gone away." At page 66 of your deposition when you were asked about the appearance at the time she went to the hospital. "Question: Was it swollen in that area at that time? Answer: No." Was that question asked you and did you answer that way? A. Yes.

Q. You were asked about your mother's symptoms and how she was feeling during the first of July and when she went to the hospital, do you recall that? A. Yes.

Q. You said in substance that during that period she had dizziness and headaches, is that correct? A. Yes.

Q. Were they symptoms that she had on previous occasions when she was suffering from high blood pressure? A. Not to my knowledge.

Q. Was there a time during that period when her leg gave when she was opening the refrigerator in that period of early July? A. Yes.

21 Q. She was at least up and walking around to the extent that she could go from wherever she was back to the kitchen? A. With assistance.

Q. And by whom was she assisted? A. By me.

Q. Why didn't you open it yourself for her? A. I don't know.

Q. On your deposition you didn't mention that your mother was feverish during this period. A. I don't recall.

Q. Haven't you re-read your deposition in anticipation of testifying at this trial? A. Yes.

Q. You don't recall having said anything about her being feverish? A. No.

Q. Did you take her temperature? A. No.

Q. Has anybody told you in preparation for this trial that feverish may be of some consequence in diagnoses of her disease? Whether or not your mother had fever was of importance in fixing the cause of her death? A. Not to my knowledge.

Q. How do you come up with fever today when you related her

22 symptoms and didn't back two years ago? A. Her body was always hot and feverish.

Q. You forgot to mention it two years ago, is that right? A. Yes.

* * * * *

FURTHER CROSS-EXAMINATION

BY MR. WELCH:

* * * * *

30 Q. By the way, no one was dependent in any way whatsoever financially, were they? A. My brother really was.

Q. When did you decide that your brother was dependent on your mother? A. He very seldom worked.

Q. Didn't you testify in your deposition that he was working for Zimmerman Contracting Painters? A. After my mother passed away.

Q. Did he work before that at all. A. Not with my husband.

31 Very little.

Q. You remember in your deposition at page 55 being asked these questions and giving these answers? Question: What was your mother's hourly charge when she worked for Mr. Petrone? Answer: $1.00 an hour. "Was anybody dependent to any degree upon your mother or her support? Answer: No." Do you recall that question and answer? Did you give that answer? A. Yes.

Q. You have changed your mind? A. Yes.

* * * * *

Q. You were telling the truth when you answered this question

32 in the deposition, weren't you? A. Yes.

Q. Just before we adjourned I asked you something with respect to a question which your own counsel had asked you on your deposition, page 62, concerning whether you received information with regard to the wound in your mother's arm and the treatment, therefore, being responsible or having contributed to her death, for which you answered no.

Now, with respect to that further on in your deposition — first,

today, did you testify this morning that during the period from July 2 when Dr. Hantsoo first saw your mother until July 21 when you went to the hospital that her condition got worse.

She was nauseated, weak and feverish. Her arm was hard and red in the upper part and the lower part was slightly red. In respect to that I refer to your deposition on page 64 and page 65 — it may go to 66. Did you give these answers? "By Mr. Alprin: Question: You said the upper part of her arm was still swollen? Answer: Do you mean the elbow and shoulder? Question: Yes. The upper part of the arm. You meant between the elbow and the shoulder that was swollen? Answer: Yes. Question: To what extent? Answer: About half an inch to an inch high.

"Question: And that was the actual point of the puncture or laceration? And was the actual point of the laceration still in any way sore? Answer: Yes. Question: Describe it to me fully. Answer: It was still there. It had not completely healed. Question: It was still open? Answer: No. Question: It was closed over? Answer: Yes. Question: Was it discolored? Answer: No. "It was the normal color for the arm? Answer. Yes." Did you give those answers?

A. Yes.

Q. And they were the truth? A. To the best of my knowledge.

* * * * *

44 MR. FEISSNER: At this time I would like to offer the hospital records as Exhibits Nos. 9 and 10 and the office records of Dr. Hantsoo as Exhibits Nos. 11 and 12.

THE COURT: Does that take care of all your exhibits.

MR. ROBERSON: I don't think we should put Dr. Hantsoo's records in evidence. The doctor is available.

45 THE COURT: Are there any objections to the other exhibits? The hospital records?

(There were none.)

THE COURT: Exhibits 9 and 10 will be admitted.

MR. FEISSNER: I will hold 11 and 12.

(Plaintiff's Exhibits 9 and 10 were marked for identification and received into evidence.)

MARGARET GUY IDIAN

was called as a witness, and after being duly sworn upon oath, was examined and testified as follows:

THE CLERK: What is your full true name?

THE WITNESS:

DIRECT EXAMINATION

BY MR. FEISSNER:

Q. Your name is Margaret Idian? A. Yes.

Q. Where do you live, please? A. I have moved from the address you have. I live at 3366 Brother's Place, Southeast, Washington, D. C.

Q. How long have you been a resident of Washington, D. C.? A. Since 1936.

Q. You had a sister, Bessie Lee Junes? A. Yes.

46 Q. And she was your full, natural sister? A. Yes.

Q. You are acquainted with Betty Zimmerman? A. She is my niece.

Q. Directing your attention, if I may, to the first part of July 1963, did you have occasion to be with your sister in a shopping expedition? A. Yes.

Q. Will you tell us where you folks went and what occurred? A. We went into the store. She went shopping and I left and went to the drug store at 8th and East Capitol. I did some shopping and came back. She was still at the store.

Q. Was there anything unusual about her at that point? A. Yes.

Q. What was unusual? A. She was nervous and upset and she had a Band-Aid on her arm.

Q. Did you inquire as to how that occurred? A. Yes.

Q. What were you advised? A. She told me she hurt her arm

47 on a basket in the Safeway store.

Q. Did you have the occasion to observe the offending basket?
A. Yes.

Q. Will you tell the jury where you went and what you observed?
A. I went in the store and in the back of the store, by the grocery food department, the basket was there.

Q. What did you observe? A. There was a wire broken on the basket.

Q. Where was the wire in relation to the handle? A. The handle was here (indicating) and the wire was inside the basket.

Q. Are you addressing yourself to the right side of the basket?
A. Yes.

Q. Just below your right hand? A. Yes.

Q. And for what length or distance would the wire protrude?
A. About an inch, I guess.

Q. Was this wire any different in color from any other wire in the basket? A. No.

48 Q. Was anyone else present at that time? A. No.

Q. Did you folks then go about your business? A. Yes.

Q. Did there come a time when, to your knowledge, your sister sought medical attention? A. Yes.

Q. When was that? A. The day after the accident.

Q. Do you know from whom she sought medical attention?
A. Dr. Hantsoo.

Q. Did she go alone? A. Yes.

Q. After she returned, did anything unusual take place?
A. Not then.

Q. Did there come a time when something unusual did take place? A. Yes.

Q. When was that? A. The day after she went to see the doctor. She was sick. Her armed was inflamed and she had a headache. She was nauseated.

Q. Where was the arm inflamed? A. Everywhere it hurt it was inflamed and up on this part of the right arm.

49 Q. You first referred to the right arm between the wrist and elbow? A. Yes.

Q. Was there anything there? A. Yes. A couple of places where she was injured.

Q. Where she had a puncture? A. Yes.

Q. There was something unusual on her upper arm? A. Yes.

Q. What was unusual on her upper arm? A. It was red and hard.

Q. Did there come a time when Dr. Hantsoo had occasion to visit the home when you were present? A. Yes.

Q. When was that? A. Friday, the same week.

Q. What day of the week did this happen? When you folks went to the grocery store? A. It was the first of the week. The first or the second.

Q. Did you observe the doctor doing anything when he came to the home on the 5th of July? A. Yes.

Q. What did you observe? A. He took her blood pressure and
50 changed the bandage on her arm.

Q. Did he do anything else? A. No.

Q. Did you have any discussion with him at that time? A. Yes. I asked him how she was.

Q. What did he say? A. He said he felt she would be all right.

Q. Did there come a time when he returned? A. Yes, the second time on Friday.

Q. Two times the same day. A. Yes.

Q. What did he do the second time? A. He said he didn't have any bandage and he said he would have to come back later in the day.

Q. To your knowledge, was she nauseated? A. She was sick.

Q. When you say she was sick, what is it you observed? A. She looked like she was very warm and she was suffering with a headache, a very bad headache and was nauseated. Vomiting and throwing up.

Q. Did this condition that you observed on the 5th of July continue for any length of time? A. Yes, it continued until she died.

51 Q. Madam, what about her arm, directing your attention to the forearm between the wrist and elbow? What transpired after the continuation of the swelling there? A. It was still swollen.

Q. Did it get better? A. It got better later on towards the end.

Q. Did it completely heal? A. The bandage was still on when she went to the hospital.

Q. What about the upper one? A. The upper arm was still swollen and very swollen and red and as hard as it could be.

Q. Was it in this condition when she went to the hospital?

A. Yes.

Q. What occasioned your visiting your sister at this time? What was your practice or procedure in so far as visiting your sister?

A. I went to visit her and stay with her while she was sick.

Q. Why? A. She wasn't able to do for herself.

Q. What was her physical condition prior to going shopping at the Safeway? What was her physical condition prior to you two going

52 to the Safeway on the first of July 1963? A. It was good.

Q. What was her daily routine that you observed? A. She was working.

Q. What else besides that? A. She did her housework. She went shopping. Anyplace she wanted to go when she felt like going.

Q. With what frequency or regularity did you visit your sister prior to July 1963? A. I visited my sister every day.

Q. Is there any particular reason? A. Yes, I was working and she kept my little boy at night while I worked and I would take him to her every day. I would take him to her house every day before I went to work.

Q. To your knowledge, do you know on how many occasions Dr. Hantsoo visited? A. Five or six times.

Q. Were you present? A. Yes.

Q. Did you observe what, if anything, the doctor did? A. He

went in the room and changed the bandage on her arm.

Q. Did he do anything but change the bandage? A. Not to my
53 knowledge.

Q. Did you have any discussion with the doctor as to your sister's condition? A. Yes. I would ask how she was getting along and I told him she looked to me as though she felt worse than she had been feeling. I said, "I don't think she is going to get any better," and he said, "She is going to be all right."

Q. Did you bring to the doctor's attention the upper part of the arm being swollen? A. Yes. I asked him why it was so hard and so red and swollen.

Q. What did he respond? A. He said it must have been from the shot that she had.

Q. Madam, you were with your sister continually until she went to the hospital. During the period of time from the 5th of July until the 21st of July, what was her ability to move about the house? A. She couldn't move about the house very well by herself. She would try to get up and she would get dizzy and nauseated and she couldn't make it by herself and walked to the bathroom and kitchen and she could never make it by herself.

Q. Were these conditions of nausea and weakness and redness
54 and swelling on the upper part of her arm visible and apparent on the occasions when Dr. Hantsoo visited the home? A. Yes.

Q. To your knowledge, did you observe the doctor doing anything on these occasions other than change the bandage? A. No.

MR. FEISSNER: I submit the witness, sir.

CROSS-EXAMINATION

BY MR. ROBERSON:

Q. How long did you stay with your sister on the day you went to the Safeway after you got home from the Safeway? A. I stayed there until about 4:30.

Q. And the incident happened at what time? A. It was about three or a quarter past three in the afternoon.

Q. You stayed about an hour and a half at her house? A. Yes.

Q. During that time was there a Band-Aid on her forearm that had been applied at the Safeway store? A. Yes.

Q. Was the Band-Aid taken off while you were at the house that day? A. No.

55 Q. No effort to take a look at it? A. Not all the way off.

Q. Taken off to the extent that you could look at it? A. Yes.

Q. There was no attempt made to clean it? A. No.

Q. You say your sister was in good health at the time of that incident? A. Yes.

Q. She had a history of high blood pressure extending back over several years? A. I said she had high blood pressure but at that time she seemed to be in good health.

Q. As a matter of fact, she was hospitalized in the 1950s for high blood pressure at Casualty Hospital, in 1954, for high blood pressure? A. She was in Casualty Hospital at the time, but I don't know that it was high blood pressure.

Q. You know Dr. Hantsoo had been treating her in 1959 to 1963 for high blood pressure. A. I knew he treated her but I don't know the period of years.

Q. How far back does her high blood pressure go, as far as you

56 know, before her death? A. Before her death it had been some time since she had to have treatment. I don't know how many years.

Q. She had suffered from it for at least two or three years, immediately prior to her death, had she not? A. Yes.

Q. Reviewing your deposition taken in this case in June 1965, when you were asked certain questions and you answered under oath, as of that time no one had ever told you there was any connection between your sister's death and the injury to her arm, isn't that a fact? A. No one told me.

Q. Did anyone express that opinion to you as of June 7, 1965? A. Will you repeat the question?

Q. As of the time of your deposition on June 7, 1965, no one had ever expressed to you the opinion that there was any connection between her death and this injury to her arm? A. No.

MR. ROBERSON: That is all.

FURTHER CROSS-EXAMINATION

BY MR. WELCH:

* * * * *

60 Q. Were you with your sister? Did you see her on the second of July, the day after the accident in the Safeway store? A. Yes.

Q. Were you there part of the day that day? A. Yes.

Q. She was up and about that day? A. Yes.

Q. What time did you get there that day? A. What date was that?

Q. The day after the accident. A. I was early.

Q. How long did you stay? A. I stayed most of the day.

Q. You didn't go to work until 8:00 or 9:00 in the evening. Would you consider up until the time you went to work — A. — up until the afternoon.

61 Q. You didn't stay there while she went to the doctor's, did you? A. I was there part of the time.

Q. Were you there when she went to the doctor? A. Yes.

Q. Was her daughter there when she went to the doctor? A. No.

Q. I mean Mrs. Zimmerman. A. No.

Q. Did you stay until she came home from the doctor? A. No.

Q. Did she go to see the doctor after the supper or dinner hour? A. In the evening hour.

Q. She didn't go in the afternoon? A. No.

Q. And her condition wasn't such that you found it necessary to go with her? You were there when she left? A. Yes. I wasn't there when she left. I went home.

Q. Were you at her house when she went out to go to the doctor's? A. Yes.

Q. Before she got home you left and went home? A. Yes.

62 Q. So that when she came back you were not at her house?

A. No.

Q. How far was it to the doctor's from her house, do you know?

A. It was about four blocks.

Q. Was her son at home that evening? Was he there when she went to the doctor? A. I don't remember.

Q. So, you don't remember whether he went with her? A. No.

Q. After she had gone to Dr. Hantsoo and he had come to the house you described somewhat her arm as being swollen, and so forth, did her arm heal up so that it could be observed to be better than it was before she went to the hospital? A. Before she went to the hospital?

Q. Yes, ma'am. A. The arm was still swollen, red and very hard.

Q. Had it improved any? A. I couldn't see much improvement in it.

Q. Was it healing so that you would say, from observing it, that it was getting along all right? A. Was that the upper part of the arm?

63 Q. I am talking about the arm. A. I couldn't tell there was much difference that it was improving very much.

Q. You remember your deposition on June 7, 1965? A. Yes.

Q. Would you like to refer to page 78 and tell me if you were asked these questions and gave these answers? "Question: When did the healing process get to the point where you saw a scab with respect to the day she first saw the doctor, the second, third, or whichever date it was? "Answer: I don't remember. I don't remember how long it was. Question: Was it soon after she had the shot that it began to heal? Answer: It was about a week when you could tell the difference. "Question: Then as he —" meaning the doctor "dressed it each time, following the first visit to the home, it was apparent, wasn't it, it was healing up and getting along all right? Answer: I would say it was." Did you give those answers to those questions? A. I gave a deposition.

Q. I read you some of the questions and answers, and I ask if those questions were asked and you gave those answers at that time? Did you give, particularly that last answer to this question. "Then as he dressed it each time following the first visit to the home, it was

64 apparent, wasn't it, it was healing up and getting along all right? Answer: I would say it was." You answered that that way, didn't you? A. Well, it was healing.

Q. And it was apparent? A. Not enough to do without attention.

Q. The doctor was still coming to see her? A. Yes.

Q. But it was apparent to you then and the time you gave the deposition you were telling us it was apparent that as time went on that the wound was healing up? A. Somewhat better. It was getting better.

Q. You said that when he came to the house you were there each day, is that correct? A. Yes, sir.

Q. And you said that all you saw was he changed the bandage and when he changed the bandage did he clean the wound? A. I just saw him put the bandage on.

* * * * *

66 JAMES ZIMMERMAN

was called as a witness, and after being duly sworn upon oath, was examined and testified as follows:

THE CLERK: What is your full, true name?

THE WITNESS: James Zimmerman.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. FEISSNER:

Q. Sir, your name is? A. James Zimmerman.

Q. Where do you live? A. 3801 Randolf Road, Silver Spring, Maryland.

Q. Are you married to Betty Zimmerman? A. I am.

67 Q. And you knew Mrs. Bessie Lee Junes? A. Yes.

Q. It would be the mother of your wife? A. Yes.

Q. Directing your attention to the first week of July 1963 did you have occasion to visit your mother-in-law in the company of your wife? A. Yes.

Q. When was it that you first visited, to the best of your recollection? A. It was around the first part of the month of July.

Q. What was your purpose in going to your mother-in-law's home? A. She had hurt her arm at the Safeway store and I picked up my wife and went to see how it was.

Q. Did you see anything unusual about your mother-in-law? A. She had a puncture in the top part of her arm.

Q. Which arm are you referring to? A. Her right arm.

Q. Did you stay any length of time? A. A couple of hours.

Q. Did you have occasion to return? A. Yes.

68 Q. With what frequency did you see her? A. Practically every night, I believe, to the best of my knowledge.

Q. Did you notice any change or anything unusual about your mother-in-law upon your return to her home? A. She got progressively weaker and feverish. She couldn't get out of bed after a few days.

Q. Was there anything unusual about her arm? A. The doctor, either the day after or two days after, gave her a shot. Her arm swelled up and this was bothering her.

Q. When you say "swelled up" you have to realize you were there and we were not. A. It was about the size of a soft ball. Maybe three to four inches across and it was raised up a half inch or so.

Q. Did you have occasion to speak with the doctor about this matter? A. Only at one time. The day after she had the shot, I believe, we called the doctor. She was worse and —

MR. WELCH: You said "we" called the doctor. It would be hearsay if he didn't do it himself.

THE COURT: Who called the doctor?

THE WITNESS: My wife.

MR. WELCH: I object to the testimony.

69 THE COURT: He knows whether or not he called the doctor or whether his wife called the doctor.

BY MR. FEISSNER:

Q. Did the doctor respond to the call? A. Yes.

Q. On the occasion that the doctor responded, did you have any direct conversation with the doctor himself?

MR. WELCH: You say the doctor responded. Are you speaking about on the telephone or he came as a call?

THE WITNESS: That he came.

THE COURT: He says the doctor came to the house.

MR. FEISSNER: Yes, sir, on the fifth of July.

BY MR. FEISSNER:

Q. Did you have occasion to speak with the doctor at that time yourself? A. Yes.

Q. What was the occasion for the doctor being there that you observed and what was the discussion between you and the doctor, directly? A. Mrs. Junes was much worse and she couldn't — at that time she was getting very bad. When the doctor came — I don't know whether it was Mrs. Zimmerman or myself who opened the door — but we were both standing at the door and the doctor came in and I can't remember the exact words but one statement he made that I do

70 remember is that she had a reaction to the shot.

Q. Just describe what changes you observed, if any, up until the time she went to the hospital? A. Well, she just got weaker. She couldn't get up without somebody's help.

Q. What about her arm? A. Her arm stayed swollen until the time she went to the hospital.

Q. Are you referring to the entire arm, the upper arm, or the lower arm? A. The upper arm.

Q. Did you have occasion to be present in the room and observe those things as related to the court? A. Yes, I did.

* * * * *

73 Q. Mr. Zimmerman, in the period of July 1963, what was the condition of the son Wilbur Junes? A. He worked sometimes. Not regularly.

Q. Was there anything unusual about him? A. He drank excessively at that time.

Q. Is there anything else unusual about him? A. He never went out like most people his age to enjoy himself. He stayed home when he wasn't working.

Q. Did he work with any frequency? A. Nq.

Q. What was the dependency and relationship with him to the mother?

74 MR. WELCH: I object to that. I don't think he is in a position to answer that question.

THE COURT: I think you better rephrase the question. I don't understand it and you must avoid leading questions.

BY MR. FEISSNER:

Q. What needs, if any, did his mother provide for him?

MR. WELCH: That is a leading question, too.

THE WITNESS: She provided him with a home. Sometimes he gave her money to support himself, but not often enough, I would say, to support himself.

MR. FEISSNER: That is all, sir.

CROSS-EXAMINATION

BY MR. ROBERSON:

Q. Financially, your mother-in-law couldn't help anybody very much, could she, Mr. Zimmerman? A. She tried the best she could.

Q. As a matter of fact, she didn't have regular employment herself. A. She worked fairly steadily at baby sitting.

Q. She didn't earn enough from that to pay an income tax or file an income tax return. A. No, but she had social security she was collecting at the time.

Q. Forty dollars a month? A. I don't know the exact figure.

* * * * *

76 MR. FEISSNER: Your honor, at this point the plaintiff will read portions of the deposition of Dr. Hantsoo.

MR. WELCH: If he is going to call the doctor to the stand what is the purpose of the reading of the deposition?

(Counsel approach the bench.)

MR. WELCH: You said he is going to call the doctor to the stand. I don't understand why he wants to read his deposition.

THE COURT: Do you mean you are going to call the defendant to the stand?

MR. FEISSNER: Yes, sir. I am going to read portions from his deposition.

THE COURT: Not when the person is present and available.

MR. FEISSNER: May I respond? I refer to Dr. Moore's

77 treatise Section 6.29 and refer to the case of Motor Freight vs. Downing. It is the position of the plaintiff that the rule in the case is cited and the authority is cited that the precise point your honor just made is what is ruled on by District Judge who ruled, as you said, if there is a witness on the stand you cannot also use the deposition and, citing Dr. Moore, the court held directly to the contrary and portions may be used for any purpose. The court specifically held in this opinion that under the rule heretofore quoted, the plaintiff was entitled to introduce plaintiff's deposition into evidence, subject to the court's ruling, in relation to the witness' s testimony on the stand. It has always been done here, sir.

MR. WELCH: I have never heard of it being done here, and it is not always done here and counsel knows better.

MR. FEISSNER: I would be very happy to get Professor Moore's treatise.

MR. WELCH: Counsel has learned something about the practice of law I never heard of.

THE COURT: The trial court said when they have the witness here they have to interrogate the witness and the court wouldn't let the deposition in for anything but impeachment and the court citing the rule

which provides that the deposition of a party may be used by an adverse party for any purpose. They said that under the rule quoted

78 "Plaintiff was entitled to introduce the deposition into evidence subject to the court's right to exclude. There is doubt they would pass on whether or not it would be a reversible error." I have never heard. That is a 1955 case. I have never heard of introducing the deposition directly when the witness is present. You, of course, have a right to examine the witness if he is a party as an adverse witness and ask him any questions you want.

MR. FEISSNER: May I inquire if your honor would allow me to present, on the subject of the many citations of Moore — I don't mean to argue with the court.

THE COURT: I don't know why we had to wait until we got the jury in the box. This is all in the 8th Circuit and I would think you should examine the defendant. You can ask him anything about this by way of impeachment. It may be even without asking him. You might be able to introduce the deposition by way of impeachment, but if that is the case the other side can ask him to explain it.

MR. FEISSNER: It is your honor's ruling that I will not be allowed to read portions of the deposition and then put the doctor on the stand.

THE COURT: Put him on the stand and ask him if there is

79 something said before that is inconsistent, you can read it to him and give him an opportunity to explain it.

MR. FEISSNER: Very well. We will take an objection to your ruling.

(The hearing continues before the jury.)

LEONHARD HANTSOO

was called as a witness, and after being duly sworn upon oath, was examined and testified as follows:

THE CLERK: What is your full, true name?

THE WITNESS: Leonhard Hantsoo.

DIRECT EXAMINATION

BY MR. FEISSNER:

Q. You are a physician in doctor's medicine, is that correct? A. Yes.

* * * * *

83 Q. From the first time, when you first treated Mrs. Junes in February 4, 1963, had you ever given Mrs. Junes an injection such as penicillin or myosin for any bronchial infections? A. I gave her
84 chloromycetin. That was April 1960.

Q. Did you ever give her penicillin? A. No. She is allergic to penicillin.

Q. She said she was allergic to it? A. Yes. I didn't try.

Q. Did you know when it was she told you she was allergic to penicillin? A. That was the first time when she came to me.

Q. Do your records indicate that, sir? A. No.

Q. You are calling on your memory at this time? A. Yes, on my memory.

Q. Doctor, going back, if I may a moment. On the date of April 19, 1960, when you saw Mrs. Junes, one of her complaints was also frequent urination, is that correct? A. Yes.

Q. What did you do in regard to that complaint? A. I gave her a prescription for a urinary disenfectant. It has the appearance of cystitis.

Q. What is the name of the drug? A. Cystitis is an infection of the bladder.

Q. Did you at that time take and have any tests run on her urine to determine the content of the urine? A. No.

85 Q. Just based on her complaint of frequent urination you gave her this tablet? A. Yes.

Q. And you also gave her, at that time as you told us earlier, tablets for blood pressure? A. Yes.

Q. After June 11, 1962, did you see Mrs. Junes again? A. Yes. June 11. That was on February 4, 1963.

Q. My question was from June 1962 until February of 1963, did you see her any in the intervening period? A. No.

Q. You saw her in February of 1963? Is that correct?

A. That is correct, yes.

Q. And she again had a blood pressure of what? A. 240/130.

Q. Did she have a temperature at that time? A. She had a temperature this time.

Q. What did you prescribe for her? A. I gave her some expectorant and I gave her for blood pressure Robaxin.

Q. When did you see her again after June 11, 1962? A. Then, I saw her again on July 2, 1963, and she came to my office.

Q. What was the history that brought her to your office?

86 A. She came with a small laceration on the dorsal side of her right hand.

Q. What did you do for her, sir? A. The laceration, it was a scratch from some object and the edges were not even. There were pieces of epidermis and I put a band-aid on it.

Q. An anti-biotic ointment? A. Yes, for external use.

Q. The anti-biotic is to treat the skin and blood where it is cut?

A. Yes.

Q. You put it over the area where she was cut, did you not?

A. It was a laceration.

Q. You also gave her tetanus on this occasion, did you not?

A. I gave her an injection of tetanus toxide.

Q. And prior to this occasion, prior to July 2, 1963, had you ever given her tetanus before? A. No.

Q. Did you inquire whether or not she had any known allergy to tetanus at this time you gave it to her? A. Tetanus toxide doesn't cause allergic reaction.

Q. Did you inquire whether or not she had any known allergy to

87 tetanus toxide? A. It didn't exist in a specific allergy.

Q. You did not ask her.

THE COURT: You are not talking about the same thing as the

doctor is. You are asking — he said he gave her something entirely different.

MR. FEISSNER: I am asking whether or not he inquired whether she had any known allergy to tetanus toxide. He didn't give her anti-toxin.

THE COURT: He has told you that doesn't cause an allergic reaction.

MR. FEISSNER: I want to determine the fact that he did not ask her if she was allergic.

THE WITNESS: It doesn't exist as a specific allergy.

BY MR. FEISSNER:

Q. When did you see her after the second of July? A. I saw her on the 5th of July.

Q. First of all, do you know what time it was that you saw her on the 5th of July? A. On the 5th of July I made two house calls on her.

Q. Do you know what time the first one was? A. That was before noon.

Q. Is this your recollection, sir? A. I was called from somewhere and she wanted to see me. She felt bad. I went to her. I had
88 planned the same day to change her bandage. I told her to come to my office to change the bandage and she called me to her home and I went over and I didn't have anything with me to change the bandage, so I had to go back again and change the bandage.

Q. She called you, you said, because she felt bad? A. Yes.

Q. And you went back the second time? A. Yes, to change the bandage. She was not able to come to the office.

Q. Why was she not able to come to the office? A. She said she was weak and couldn't do it.

Q. When you went this first time on the 5th of July 1963, do you recall what her condition was? A. I can't recall. But to me it didn't seem anything alarming.

Q. You went there the first time, and when you went there you

do not recall specifically what her condition was? You do not recall what her condition was when you went there the first time? A. No.

Q. Doctor, when you went there the first time on the 5th of July, 1963, did you perform any diagnostic examinations or tests on her? A. Yes. I took her blood pressure and her temperature and
89 the blood pressure was unusually high. I didn't put it down. Every time I went to her house, every time I took her blood pressure.

Q. Do your records reflect that you took this lady's temperature when you went there on the 5th? Do your records reflect that you took this lady's temperature on July 5, 1963? A. That is not written here.

THE COURT: He has answered the question.

BY MR. FEISSNER:

Q. Do your records reflect that you took her blood pressure on either the first or second time? A. It is not on the record.

Q. Do you recall your deposition being taken in this case by me, referring to page 10 of your deposition? "Do you recall a question being asked you when you went — when you say you went the first time, do you recall what her condition was? Answer: I don't recall. Question: When you went the first time, did you perform any diagnostic examination or tests on her? Answer: I don't recollect." A. I recollect that every time I went to her house, every time I took her blood pressure.

THE COURT: What counsel asked is, do you remember that you gave the answer that he read to you at the time he took your deposition.

90 THE WITNESS: I don't remember.

THE COURT: You have asked him whether or not he remembers answering those questions and he says he doesn't.

BY MR. FEISSNER:

Q. At the time you went there the first time on the 5th of July, did you carry a little black bag with you like most doctors do? A. Yes.

Q. Do you recall anything about her color, pallor, the first time you went there on July 5? A. No.

Q. You do not recall? A. No.

Q. When you came back the second time on July 5, was it in response to her call or because of your own feeling that you should see her again? A. I told her when she was there on July 2, in my office, to come back to have the bandage changed on the 5th of July and instead she called me to her home and when I went the first time — when I went the first time she called me and I didn't have any material with me to change the bandage and the bandage had to be changed and she said that she was not able to come to the office. Then, I had to go back and change the bandage.

91 Q. You did have your little black bag when you went there, did you not? A. Yes.

Q. When you saw her for the first time on the 5th of July, you felt there would be reason to change the bandage that same day? A. The bandage was on three days.

* * * * *

92 Q. How big was the injured place, sir? A. It was a scratch, or laceration. It was a little more than an inch long. The bandage was apparently a two-by-two gauze pad. It is the smallest one.

93 Q. If I understand correctly, there are two centimeters to an inch, is that accurate, sir? A. No, 2-1/2.

Q. Then, three centimeters would be an inch and an eighth? A. A little more than an inch.

Q. And the laceration on the right forearm of Mrs. Junes was a little more than an inch? A. Yes.

Q. Was there anything unusual about her condition when you went to see her the second time on July 5, 1963? A. The second time I went only to change the bandage.

Q. Was there anything unusual? A. I don't think there was anything unusual.

Q. You saw her next on the 8th of July 1963, is that correct, sir? A. Yes.

Q. Did you see her at her home or at your office? A. At her home.

Q. Did she call you or did you call her? A. She said that she is not able to come to my office. Then I went and changed the bandage at her home.

Q. On July 8, 1963, did you do anything else but change the bandage? A. I remember every time when I went to her home I

94 took her blood pressure too.

Q. Doctor, is your memory today fresher than it was in 1965? What happened in January 1965? A. That is very hard to say.

Q. All right, sir. Would you be kind enough, doctor, to tell the court and ladies and gentlemen of the jury first of all, on your treatment sheet, is there any recording that you did anything on July 8, 1963 other than changing the bandage? A. There is nothing written here.

Q. All it says on there is that you changed the bandage? A. Yes.

Q. Do you recall when your deposition was taken and, if I may, sir, did you not, after the deposition was taken, read it over and sign it? A. Yes.

Q. Do you recall these questions being asked you and you giving these answers? Referring to page 12. "Question: What was her condition when you went there on the 8th of July? Answer: I just changed the bandage. Nothing else is written here. Question: Do you recall doing anything else, doctor? Answer: No." Is that correct? A. Yes.

95 Q. You didn't do anything but change the bandage? A. I told you several times that every time I went to her home I changed the bandage and, as a routine, took her blood pressure.

Q. Is there any reason you can assign as to why you can't recall when your deposition was taken why it was not written on the sheet when everything else was written on there? A. The other things were not in connection with the treatment of the injury.

Q. Didn't you take her blood pressure on July 2, 1963? A. Yes.

Q. And you would say on July 5th and 8th it was not in connection with that? A. It has nothing to do with the injury.

Q. Doctor, when you went there on the 8th, do you recall giving her any medication? A. I don't recall.

Q. You have no independent recollection, is that correct? A. No, I don't recollect.

Q. When did you see her after July 8th of 1963? A. On July 12 — July 17.

Q. Just one at a time, if I may, sir. Doctor, according to your office record what did you do on July 12, 1963? A. I changed the
96 bandage.

Q. This is all you did on July 12, is it not, sir? A. I was talking to her and I don't recollect, but I was looking at her and told her what to do and how to do it.

Q. You have no independent recollection, however? A. No.

Q. Doctor, as of now, that is the 12th of July, 1963, you have told the court and the ladies and gentlemen of the jury about four occasions from the time this lady was injured that you went to see her and/or treat her, and/or change her bandage. Was there something unusual about this, I wonder, that required that the bandage be changed several times in 10 days? A. Old bandages are changed — they are all changed after three or four days. Sometimes they are kept on five days, but it usually starts to smell and people don't like it. It is completely natural.

Q. Earlier, when you were asked whether there was anything unusual about her condition as of the fifth of July, you stated this was nothing unusual. Now, I understand, in fact, she had an infected wound, is that correct? An infected wound is unusual, is it not, sir?
97 THE COURT: You are arguing with the witness, now.

BY MR. FEISSNER:

Q. Doctor, when did you first determine that the wound was infected? A. The first time when she came to my office.

Q. On July 2, 1963? A. Yes.

Q. What was the appearance or condition of the wound that led you to the conclusion that it was infected on July 2, 1963?

A. It had signs of inflammation.

Q. And around the wound it was red and inflamed? A. It was swollen. It was painful.

Q. As a matter of fact, doctor, you saw fit to take a scissors and cut off loose skin? A. Yes, dead skin and tissue that are on a wound, especially when it is not cut by a knife or cutting instrument but by a wire or fingernail. It always has edges that are dead and have no blood supply.

Q. That was a puncture type wound? A. It was a scratch.

Q. Were you advised by Mrs. Junes that she had injured her right forearm on the sharp end of a wire on a cart in a Safeway store? A. Yes.

98 Q. Doctor, going back, if we may, after the 12th, when did you next see Mrs. Junes? A. In July, on the 15th.

Q. And, according to your office records, what did you do on July 15, 1963? A. I went to her to change the bandage.

Q. And am I correct you do not recall doing anything else that day except changing the bandage? A. I am sure I took her blood pressure too. I am sure I was talking to her and giving her instructions on what to do — take her medicine. What I advised her the first time she came.

Q. Do you have recorded, on your office records, what the blood pressure was? A. No.

Q. Do you recall in the testimony you gave in January 1965, referring to page 14 of your deposition, "Question: When did you see her after the 12th? Answer: On the 15th. Question: What did you do on that occasion? Answer: Again, changed the bandage. Question: Did you do anything else, do you recall? Answer: I don't recall anything else. I don't recall. Question: When did you see her after the 5th of July, sir? Answer: On July 18. Question: According to your

office records, what did you do on that occasion? Answer: I
99 changed the bandage. Question: And you have no recollection of doing anything else, sir? Answer: No."

Q. The next occasion that you saw her was when she was at Casualty Hospital on the 21st of July? A. Yes.

Q. And your patient expired on the 24th of July? A. Yes.

Q. Doctor, during the period of time that Mrs. Junes was at her home under your care from July 2, 1963 until July 21, 1963, had you given her as medical or therapeutic advice that she should get up from her bed and move around the house so that she wouldn't become weak? A. Yes.

Q. Doctor, on the occasions of your visits on the 5th, the 8th, the 12th, the 15th, and 18th, was not your patient bedridden? A. I didn't order her special bed rest. She came and answered the door and I went in and she went and was sitting on her bed when I came and examined her and changed the bandage.

Q. When you went to her home she was usually in bed?
A. She answered the door.

Q. Doctor, insofar as her treatment for her wound was concerned, it responded very slowly, did it not? A. It responded slowly.
100 That is completely in accordance with an elderly person with high blood pressure.

Q. Also, Mrs. Junes complained about the place hurting where the needle had been given for tetanus, had she not? A. Yes. That was usual. It is the usual reaction to toxoid injections.

Q. Doctor, you had stated that the injury had become infected and that on your observation it was infected the first time Mrs. Junes saw you on the second of July 1963. A. Yes, it was infected.

Q. Did this injury thereafter become inflamed? A. You see, first comes infection. Then it is an inflammation. It is infected the same moment when you have an unprepared, uncleaned part of skin and you scratch it on an unsterile object with a piece of wire or scratch the finger nail, it is infected. It is not unusual for an injury

of this nature, when it is inflamed, gashed on a cart where it is used by people.

Q. This wound became inflamed? A. Yes.

Q. Not withstanding the fact that you used an antibiotic, she developed additional troubles, did she not? Did not Mrs. Junes develop additional difficulties with her arm? A. No, not from the
101 antibiotic. That was a local antibiotic. Not systemic.

Q. Not withstanding the fact that an antibiotic was used she then had further difficulty with her arm, did she not? A. There was no indication to give any systemic antibiotic.

THE COURT: He asked if she had further difficulties with her arm after you applied the antibiotic externally.

THE WITNESS: No.

BY MR. FEISSNER:

Q. I am referring to plaintiff's Exhibit No. 11, marked for identification. Would you look at this and first of all, tell me, is this a letter you wrote?

* * * * *

102 Washington, D. C.
November 15, 1967

104 PROCEEDINGS

THE COURT: Good morning, ladies and gentlemen. I am glad to see you here again this morning.

DIRECT EXAMINATION (Resumed)

BY MR. FEISSNER:

Q. Doctor, at this point, I believe, you identified yesterday, plaintiff's exhibit No. 11 as a memorandum written by you, is that correct? A. Yes.

Q. Written on November 4, 1963 regarding your patient, Mrs. Bessie Junes? A. Yes.

Q. Exhibit No. 12 is written by you in the ordinary course of business and is your office record, is that correct? A. Yes.

Q. As far as you know the photostat attached hereto is the same as your original? A. Yes, sir.

Q. Doctor, when we stopped yesterday, my recollection was that the last question that was presented to you and the last answer that you made was that other than the cut on the arm that there was nothing unusual. Do you recall saying that yesterday, sir? A. Yes.

105 Q. By the way, Doctor, since you left the witness stand last night you have re-read your deposition? A. Yes.

Q. And you refreshed your recollection with it? A. Yes.

Q. Fine. Doctor, didn't you sit right here and read your deposition this morning at the end of the table? A. It was in front of me.

Q. And you read it? A. I didn't read it. I was just looking around.

Q. All right, sir. Doctor, is it not correct that on November 4, 1963, you stated in a memorandum regarding Mrs. Bessie Lee Junes, "There was an inflammed (infected) laceration on her right forearm. The laceration was about three centimeters long with uneven edges.

"After debridement, a bandage with an anti-biotic was applied. Despite the anti-biotic, the patient developed a dermatitis on her right arm with lymphadenitis and fever. The patient's condition improved slowly and the laceration healed," is that correct? A. Yes.

Q. Then, sir, there was an infection and she did develop an inflammation in her arm.

MR. WELCH: He has testified to that twice.

THE COURT: That is all right. He has the right to ask the

106 question in a different form.

BY MR. FEISSNER:

Q. She did develop an infection and inflammation in her right arm? A. When a wound is infected and inflammed that means the surrounding arm has also been affected. It is not a systemic infection.

Q. Along with the dermatitis on the right arm and lymphadenitis, did she also not develop a fever? A. She had fever the next day.

Q. She had fever? A. Yes.

Q. Doctor, when you saw Mrs. Junes on the fifth of July, the day you came to her home, did she give you any complaints whatsoever on that day? A. Yesterday, I said that I told her to come to my office for changing of the bandage on the fifth of July and I was called in the morning of the fifth of July that she felt bad and would I come to see her as soon as possible.

Q. When you got there what physical signs did she show? A. I don't recall what physical signs there were.

Q. We have been through the fact of your visits on the 5th, 8th, 12th, 15th, and the 18th, is what I am referring to at this point. Getting down to the 18th of July, this was again a visit at her home? A. Yes.

107 Q. And all of the visits that you made were at her home? A. Yes.

Q. She was semi-confined to bed and a little too weak and sick to come out to your office, was she not, which is the reason you went to her home? A. I don't think there is any possibility for a physician to determine how much is a person able and how much unable to say.

Q. Doctor, as you stated she was in bed during this period of time. The last time you saw her was the 18th and she was in bed.

MR. WELCH: The doctor has testified and I see no reason for repeating, trying to get a different answer. The doctor said she came to the

door and let him in and then she would go back to bed.

THE COURT: The objection is overruled.

BY MR. FEISSNER: The court says you may answer.

THE WITNESS: I really don't know. She opened the door for me when I went in.

BY MR. FEISSNER:

Q. Doctor, when you saw her on the 18th, according to your office records, you changed her bandage, is that correct? A. Yes.

108 Q. Was the wound cleared up at that time? The wound to her right arm? A. I don't recall when I put the bandage on. Then, I guess she had to have a bandage. I found it necessary to have it on. The skin was growing over the wound or was there and still open. I don't recall.

Q. Doctor, do you recall if the wound cleared up at the time she entered the hospital? A. I don't recall.

Q. Doctor, as to your question about the 18th about whether or not her arm was healed, do you recall my asking you this question and you giving this answer, and perhaps you have had a chance to refer to it after. This question was asked to you by Mr. Connolly, associate of Mr. Roberson:

"Do you have any material among your notes which would refresh your reaction as to whether she had experienced a healing of the laceration? Answer: No, there is nothing written about this. I changed the bandage on the 18th and it probably was not healed completely by this day. No." Do you recall this, sir? A. Yes, I put it on. I found it necessary to have it on. So, there was something wrong with it. Either it was not completely healed or I did put the bandage just to protect the new skin.

109 Q. Doctor, you have indicated to the court and ladies and gentlemen of the jury that Mrs. Junes had high blood pressure. In your care and treatment of her, did you ever have a blood test which would have rated her cholesteral count?

MR. WELCH: There is no question of cholesteral in the case.

THE COURT: Sustained.

BY MR. FEISSNER:

Q. Doctor, when Mrs. Junes first came to see you on February 9, 1959, was she suffering from high blood pressure?

MR. WELCH: That is what he first testified to.

THE COURT: The objection is sustained. The testimony was that she had high blood pressure several years back.

BY MR. FEISSNER:

Q. Dodctor, did you treat Mrs. Junes for high blood pressure in February 1959? A. No, I was treating, at this time, only for an upper respiratory infection.

Q. Doctor, yesterday, you stated, in answer to a question as to what you did when you came on the 5th, 8th, 12th, 15th, and 18th -- and a specific question was put to you -- whether you took her blood pressure on the occasions you came and I ask you now, sir, did you or did you in fact, and do you have a recollection, that you took her blood pressure at any time after July 2, 1963?

110 MR. WELCH: If the court please, the doctor testified to almost the same question yesterday.

THE COURT: I am going to let him answer. Let us get this over with.

BY MR. FEISSNER:

Q. You may answer.

A. I am sure that I took the blood pressure. The routine things I do for a patient I don't write them down. I write only what was done and what I find important and for a person who has had high blood pressure for a long standing time, I check the blood pressure, yes.

If it is going very high, like she had it -- once it was 270 -- then I would put it down. When she had the same thing she had for the last seven or eight years it doesn't make any sense to waste ink and paper for writing it down.

As a matter of fact, her blood pressure was 216/110, not 170 at that time. Yes.

Q. On page 32 of the deposition the question was asked again, doctor, "What was her blood pressure on June 2, 1963?" A. June 2?

Q. Amended to July 17. Was it 216/110? Did you take her blood
111 pressure prior to any time after that? A. I don't remember. I guess I took it, but I don't remember.

Q. Is it correct that you don't remember? A. I recollect that I took sometimes her blood pressure. I was sitting beside her on the couch or on the edge of the bed and took her blood pressure. I can't say, but I say I usually take it every time I go to a patient.

Q. But you can't say in this case? A. The same thing. I can't say if I said good morning or good evening.

Q. What were your charges for your care and treatment of Mrs. Junes for the care and treatment that you rendered to her?

THE COURT: Don't you have that stipulated to in the pre-trial statement?

BY MR. FEISSNER:

Q. What were your charges? A. Eight dollars.

Q. For the entire treatment? A. On the second of July? Eight dollars the second of July. She was short of funds.

Q. And the fifth of July, what was the charge? A. Two visits. That was $14.00.

Q. And on the 8th of July? A. Eight dollars.

112 Q. And on the 12th of July?

THE COURT: Why are you doing this? You have already got a stipulation which we can read to the jury as to what the total cost of the doctor's treatments are. Isn't that Exhibit No. 12?

MR. FEISSNER: It is on Exhibit No. 12.

THE COURT: Then, we don't need to go into it. It has been admitted.

CROSS-EXAMINATION

BY MR. ROBERSON:

Q. Dr. Hantsoo, when Mrs. Junes came to you, your offices on July 2, which was Tuesday of 1963, there was some inflammation on her

forearm? A. Yes.

Q. Thereafter, did that inflammation improve or did it become worse between that time and the time she went to the hospital on the 21st of July? A. At first, it went worse and then it improved and by the time she went to the hospital there was no practical inflammation.

Q. When a patient enters a hospital, Doctor, is he given an examination as soon as he enters a hospital? A. Yes.

Q. Have you examined the hospital records at Casualty Hospital
113 with respect to this lady, Mrs. Junes? Have you looked at the hospital records? A. Yes, I have them here.

Q. Is there any notation in the hospital records that she had a mark or inflammation at the time she entered on the 21st of July 1963? A. There is no sign about any.

Q. Is that examination ordinarily done by you as her attending physician or is it done by a resident? A. It is done by a resident.

Q. And was there such an examination by a physician there at the hospital other than yourself? Is there a record there signed by someone else? A. Yes, the record -- what is important in the course of treatment or the course of the disease.

Q. Had there been any inflammation of the arm at the time she entered the hospital, would it have been the duty of the examining resident or intern to make a note? A. There are no notes about the arm.

Q. I know there is none, but if there had been inflammation would it have been the duty of the man to make a note of it? A. Yes, it would be.

Q. Dr. Hantsoo, what did Mrs. Junes die of? What was the cause of her death on July 24, 1963? A. The cause of death was cerebral
114 vascular accident.

Q. What is that? A. That is some trouble with circulation. Either closing up an artery of the blood vessel or a rupture of the blood vessel.

Q. Did you make out the death certificate in this case? A. Yes.

Q. Did her hypertension have anything to do with her death? A. Yes.

Q. What is the relationship, if any, between hypertension and this cerebral vascular accident you say she died of? A. People with high blood pressure have several times more possibilities of cerebral vascular accidents. It happens very seldom with people who have low blood pressure.

Q. Is this cerebral vascular accident the thing that we laymen refer to as a stroke? A. Yes.

Q. What, if any, casual relationship between this stroke that this lady died of and the scratch she had on her arm on the first of July 1963 was there? A. It is very hard to find the relationship.

Q. Was there any, in your opinion? A. In my opinion it was not.

115 Q. Pardon? A. There was no relationship.

Q. Why do you say that? What are your reasons? A. She didn't have any inflammation or thrombosis in her systemic blood vessel and—— it may happen that the thrombosis loosened from the thrombosis vein or vessel, going to the heart and in some people it may be a connection between the right and left artery.

Then, the thrombosis may pass this opening and it has the possibility of going to the brain. Usually, when the thrombosis comes from an inflamed vein or, an inflamed part of the body, it passes the heart and goes to the lung. It is the usual way that the blood flows, but she did not have thrombosis. And she had no signs or any opening between the right and left heart atrium.

Q. Dr. Hantsoo, you have mentioned several times she had no systemic infection. What do you mean by that? A. That is when the whole body is affected with high fever and, chiefly, it is high fever.

Q. What was this lady's temperature when she entered the hospital, according to the hospital records? A. When she entered the hospital -- this day she didn't have an elevated temperature. Her temperature was 98.4.

116 Q. Is that considered normal?

THE COURT: I am sure that the jury understands, but when you speak of this cerebral accident and you explain it as a rupture of a blood vessel, or closing, the word cerebral means brain.

FURTHER CROSS-EXAMINATION

BY MR. WELCH:

Q. Doctor, you gave this woman, when she first came to you, a tetanus toxid injection? A. Yes.

Q. What is the purpose of that? A. To build up resistance against tetanus infection.

Q. Did you medically see any connection between that injection and her death from a cerebral vascular accident? A. No.

* * * * * *

REDIRECT EXAMINATION

* * * * * *

117 JAMES CHAPMAN

was called as a witness, and after being duly sworn upon oath, was examined and testified as follows:

THE CLERK: What is your full, true name, sir?

THE WITNESS: James Chapman.

DIRECT EXAMINATION

MR. FEISSNER: May the record show I am placing Exhibits 9, 10, 11, and 12 before the witness.

BY MR. FEISSNER:

Q. Sir, your name is James Chapman? A. Yes, sir.

Q. And you are a physician in the practice of medicine, sir? A. Yes.

Q. Where do you practice? A. In the District of Columbia and the State of Maryland and the Commonwealth of Virginia.

Q. Do you have an office in the District? A. Yes, sir.

Q. Do you have an office in Virginia? A. Yes, sir.

Q. What is your educational background to qualify you for the practice of medicine? A. I attended George Washington University School of Medicine and I graduated in 1949 and took an internship of one year at Indianapolis General Hospital in Indianapolis and, subsequent to that, three years of general medical residency in Indianapolis hospitals and Washington,

D. C., hospitals.

Q. When did you enter practice? A. In 1953.

Q. Where, sir? A. Washington, D. C.

Q. Have you continually been in the general practice of medicine since that time? A. Yes.

Q. Are you on the staff of any hospital? A. Yes.

Q. The Washington Hospital Center, Providence Hospital, Doctors' Hospital. Also, the Northern Virginia Hospital, Fairfax Hospital.

119 Q. Doctor, in addition to your educational and practical experience, have you done any teaching in the field of medicine? A. Yes, at one time.

Q. When and where? A. Between the years of 1950 and 1956 or 1957 I taught on two occasions: one at Indiana University School of Medicine and as instructor in medicine at the George Washington University.

Q. In what field? A. General medicine.

Q. What is your practice today? A. I do general medicine with the exception of delivering babies or extensive surgery.

Q. Do you at this time have a connection with the United States Army in the field of medicine? A. Yes, I do.

Q. What is your connection with the United States Army in the field of medicine? A. I am a reserve officer in the army.

Q. What do you do in relation to that? A. I command an army research hospital.

Q. Where is the hospital? A. In the District of Columbia.

120 Q. What rank do you hold? A. Colonel.

Q. Are you familiar with the standards of medical practice in the District of Columbia as rendered by physicians in the general practice of medicine from the years 1960 through the present? A. Yes, I am.

MR. FEISSNER: I submit the witness to voir dire.

VOIR DIRE EXAMINATION

BY MR. ROBERSON:

Q. Are you certified as a specialist by any board? A. No, sir, I am not.

FURTHER DIRECT EXAMINATION

BY MR. FEISSNER:

Q. Would you explain for the record what medical records you have examined for Mrs. Junes? A. I have reviewed the records from the Casualty hospital. I believe there were two documents pertaining to two different admissions of this patient to that hospital and also the records of the physicians from the physician's office.

Q. When you refer to the record, so that the court record will be straight, what exhibits are you referring to? A. Exhibits 12, 8, 10. There is a medical statement here signed by the doctor in this case, which I also reviewed.

Q. And what is that? A. Exhibit No. 11.

121 Q. Doctor, have you been present in this court room since the beginning of this trial? A. Yes, sir, I have.

Q. And have you heard the testimony that has come from the witness stand? A. I have.

Q. Doctor, considering the testimony admitted by the court that you heard and your review and examination of the medical records that you referred to, that is, the records of hospitalization at Casualty Hospital and your review of the doctor's office records, Exhibit 12, and your review of the letter of the defendant physician, Exhibit 11, and considering the testimony as offered in its entirety, can you, from your examination, express an opinion within the framework of reasonable medical probability as to whether the care and treatment given by Dr. Leonhard Hantsoo comports with the accepted medical practice in this area at the time it was given?

MR. WELCH: This question only calls for a yes or no answer.

THE WITNESS: Yes.

MR. WELCH: I object to that. I would like to advise the court why.

(The jury is excused.)

122 MR. WELCH: If the court please, I object to the question being answered by this doctor for several reasons. First, in order to properly

prove a medical case there has to be proved the standards by which the physician is to be judged.

Then, there has to be proved a departure from that standard. There has been no testimony offered here by anyone of what the standards are that the defendant is to be charged with, the defendant, Dr. Hantsoo, and until and unless there is some testimony as to what the standards are there is no basis for testimony by someone whom, I submit, is unqualified because he is only a general medical man and the man being tested is a surgeon.

He is not qualified to give an opinion by having read some hospital records some years after the death of a person and, having read the office records of a doctor and a report which the doctor made, which is in evidence, to determine whether or not that doctor -- first, to establish the tests and whether or not if the tests were established -- if the doctor had abided by the rules he is to be charged with, as to whether he is guilty of malpractice or negligence.

Secondly, any opinion that he might express is obviously an opinion based on another opinion. It cannot be based upon his own information taken from the patient or his having properly been in attendance in any
123 way to know what the circumstances were.

He has taken hospital records which are the composite opinions of other people. Some are residents, some interns, some the physician's, here. But they are different people expressing different opinions about what their examination of this patient disclosed at the time they made the examination.

It isn't proper, I submit, for this man to take those opinions and, based upon those opinions as expressed thereto, render a second opinion which can only be an opinion upon an opinion.

It is also based on hearsay and whatever he has been told, although this question goes only at this time to the records, the medical records he has developed or read, it is obvious from what is in the court record, namely, his deposition that he talked with Mrs. Zimmerman and

that he also read a compiled statement in longhand signed and sworn to by Mrs. Idian and the testimony of his deposition, he said he took those factors into consideration in arriving at an opinion.

With respect to an opinion upon an opinion, I think, probably, one of the leading cases in this jurisdiction is Central Dispensary vs. Saunders and Levi vs. Vaughn. They are two cases decided by the Court of Appeals here.

124 In those cases there was discussion of other cases indicating that an opinion upon an opinion is not correct. One of the main cases I would like to refer to, which I think probably your honor is familiar with. The case of Davis vs. Virginia Railroad Company, 1963, U.S. 35480, Supreme Court 387.

There is also in this jurisdiction the case of Price vs. Neyland, 1963, 115, Appeals D.C., 355, 320, Fed.2d 674, in which it was reiterated that the elements of proof in another professional malpractice case -- and they cited the Virginia case and the court stated the plaintiff must offer testimony first of the recognized standard of medical care in the community, which must be exercised by physicians in the same specialty, under similar circumstances and that the physician departed from the standard.

I submit there is no testimony to that effect here. This doctor tries to give an opinion based upon opinions which certainly can be nothing more than a compilation of opinions, hospital records, a written record, written memoranda by this doctor.

There can't be, it seems to me, any basis for permitting such an expression of opinion.

MR. FEISSNER: There are two cases which come to mind immediately. Christie vs. Callahan. A similar argument was made to the Court of Appeals. The case is 124 Fed. 2d., 825. It was a suit against some exray people, Grover, Christie and Merritt, and there was no exray expert

5 to testify and it was contended by learned counsel that for that reason other doctors couldn't testify in the Court of Appeals and it was a question of weight rather than admissibility as to whether or not, if a

doctor says he has knowledge of a reasonable standard in the community, is tested by the facts on which he testifies and on cross-examination but does not go to the absolute question of admissibility by the question of weight.

The second case, I think, is directly on opinion and which cited the case of Christie vs. Callahan; Goodwin vs. Hertzburg, and again my brother was in on the Court of Appeals and it was a reversed case where a directed verdict was granted. 201 Fed. 2d 204.

MR. WELCH: This notice is in the handwriting of Dr. Chapman, whose interest in this case is more than that, who is called as a witness. It says, "Is Dr. Hantsoo a board surgeon? Do you supervise surgeons?" And under that, "Yes."

Then, "Do I care for patients with lacerations of this type?" And, apparently, it says "diabetes," and, loosely, "high blood pressure," and the answer is "Yes." So, it will indicate the answer.

MR. FEISSNER: The other case is Goodwin vs. Hertzburg, in which a similar argument was made. The position -- and there is one last
126 case of Wolfinger vs. Frey, 237 Md.

This holds that a physician within the immediate community who is familiar with the medical practices of that community can express an opinion.

THE COURT: Have you any comment to make concerning Mr. Welch's contention that this is an opinion on an opinion?

MR. FEISSNER: The things that are within the hospital record are what the other doctor has already used. It is part of the hospital record and the business record of the hospital itself, the normal tests are clearly part of the hospital record and are such that people operate on. I suggest that the case of Wolfinger vs. Frey clearly holds that hospital records may be utilized by physicians just as they were utilized by the defendant doctor in arriving at some of his opinions.

THE COURT: In my opinion hospital records, of course, contain a certain amount of opinion of the resident or nurses or someone like that who has an official duty to perform in the hospital.

That becomes a part of the hospital record which, in effect, there is a reflection of the opinion of a good many people, but it is as close to being a fact as such. The temperature, for example, was taken and it was somebody's opinion, I suppose, as to what that thermometer shows,

127 but as to what is put down on the record as to what that temperature is, I think is a fact and not an opinion within the scope of basing an opinion on an opinion and I think the diagnosis of one doctor or another also is in the same category and that, in cases of this kind, any expert witness is going to have to rely upon hospital records which are in this category.

So, I don't believe from the standpoint of the medical records, that it is an opinion upon an opinion. Insofar as his opinion may be based upon the observations of lay witnesses, of course, I don't know at the present time of what importance or what effect this has had upon his opinion.

It would be important, for example, for some lay person to relate that on a certain date, the day she went to the hospital, she was unable to speak, for example, or appeared to be able to speak to that lay person.

It is the type information, to that extent, that doctors always rely upon in arriving at some conclusion, perhaps, in an area which is not really susceptible of any scientific test. So, I don't think the evidence should be precluded from that standpoint, but it does strike me that the question that has been asked here is so broad and so uncertain that it is objectionable to ask him if he has an opinion as to whether or not this comported with the

128 standards of this community and is too vague, in my mind.

We don't know what you are talking about. It hasn't been pinned down to any degree. As far as a general practitioner who is not a surgeon having an opinion as to what should have been done under certain circumstances when the evidence is that up to now that the patient died of a cerebral accident, this isn't necessarily in the field of a surgeon.

It is an opinion to a general practitioner as it would be to a surgeon. As we have had the wound described, it strikes me also that it doesn't necessarily or is not evidence. Particularly, that it would require a surgeon to treat it.

So, I would think some expression of opinion from a general practitioner, such as our witness on the stand, would be acceptable. I do think that you should pinpoint to some degree your questions so we know what field he is talking about.

MR. FEISSNER: What I was going to do is have the witness specify the areas. Would that meet with your approval?

THE COURT: I am sustaining the objection. If you can ask some other question you might as well try it out of the presence of the jury.

129 MR. FEISSNER: My next question would be to describe the treatment given by Dr. Hantsoo and whether or not this treatment comported with the reasonable standards of medical practice in this community. Then, my next question is what would be the standard medical practice in this community and the relationship between the deficiency in the treatment and ---

THE COURT: It seems to me that Mr. Welch is right in saying -- and this relates to what I have just said -- I think you have to pinpoint what this is that you are driving at so that we know what area of medical practice is involved in this question.

Then, I think you would have to show what the standard is and then, if it is the opinion of our witness that the doctor didn't comply with that, he can explain why.

MR. FEISSNER: Very well.

THE COURT: You have, in your pleadings and in the pre-trial order, charged that the cause of death was failure to treat this wound in the proper way and you have also charged that the death resulted from an allergic reaction to a shot that was given.

As of now we don't have any evidence whatsoever to support the theory that the cause of death was an allergic reaction from the shot that

was given. If you have any evidence of that kind then I think you ought to put
130 it on. If you don't have, then I suppose you will have to abandon that.

MR. FEISSNER: Your honor, the testimony will be that the entirety of the treatment, including the shot to the person of this nature, was such as to place such a demand on her system because there was impropriety in failing to do things as the doctor went along when her condition didn't improve and to the totality of these things, put such a load on her system as to cause her demise. In Dr. Chapman's deposition, taken by the defense, I can show --

THE COURT: I don't pretend to be an expert in this field. I probably have shown that I am not. But, it seems to me that it is not a part of the question of standards of reasonable medical care in the community, and so forth, that involves the question that you just spoke of.

In other words, Dr. Chapman's view of what caused the death of the patient is entirely apart from whether or not Dr. Hantsoo performed his duties as a physician and surgeon within the proper limits.

It seems to me that comes first rather than the question as to whether or not he lived up to the standards of the community. I would like to see you go into that. Is there going to be any objection to that?

131 MR. WELCH: I anticipate there will be an objection.

THE COURT: On what basis? Is it a broad objection or do you expect to object simply to the question?

MR. WELCH: This doctor never saw the patient or heard of her two or three years after she died and then looks at the records. Somewhere in the records she had, at one time, frequent urination and he says that he should have made a lot of tests to see if she had diabetes.

Then, an infection lighted up the diabetes and it could have been a probable cause and therefore he should have taken further tests. All that is hindsight, reading and trying to find some reason for saying something else which could have or may have done something else.

He did not testify, in his deposition, in the manner as indicated by Mr. Feissner. He did not say that what this doctor did in treating this

wound was not in accordance with good practice.

In fact, he made an exception and tried to differentiate between what he did up to a point and he is matching words or trying to find words to justify a conclusion from the reading of things some years later. I anticipate I will have a lot of objections.

THE COURT: All right, call the jury in.

Off the record.

(Discussion off the record.)

132 THE COURT: On the record.

(The jury returns to the courtroom.)

BY MR. FEISSNER:

Q. Doctor, what is the accepted medical practice for treatment of the wound of this nature?

MR. WELCH: The information is of record in this case. It is testimony as to what the wound was and I don't think the question is proper. It is too general and too broad and leaves the doctor in the position where he may take into consideration a good many things that the jury would not be aware of that he is considering as to this type of wound. The doctor has not been told what the record shows this wound was.

THE COURT: The objection is overruled.

BY MR. FEISSNER:

Q. Doctor, considering these four exhibits that you had and the testimony you heard in the courtroom, what is the accepted medical practice in this community for the treatment of a wound of this nature; considering only the four exhibits in front of you and the testimony heard here in the courtroom, kindly state what is the accepted medical practice in this community for treatment of a wound of the nature of Mrs. June's.

A. The wound, as described, was a wound which we would expect would respond to the following treatment within perhaps 7 to 10 days.

133 MR. WELCH: I object. He was only asked what was the standard treatment that should be given to such a wound.

THE COURT: Try to confine your answer to that.

THE WITNESS: The treatment we would normally render in anticipating the proper treatment would be as follows: the cleansing of the wound at the time of the first medical visit with debridement or cleaning away of any dead tissue; the possible application of a local anticeptic or antibiotic to the wound itself, is undesirable.

MR. WELCH: He wasn't asked what is undesirable.

THE COURT: Sustained. He asked you to describe what the treatment would be. I think that is proper as far as that goes.

THE WITNESS: The wound would be left open rather than having been closed, since, if the wound is potentially infected ---

MR. WELCH: There is no testimony here of the sutures causing the wound.

THE COURT: He says it would be left open. There is no evidence it wasn't left open.

THE WITNESS: Finally, an appropriate dressing or bandage would be applied. If it had been a period of time since the injury, the examination should include a search for any obvious infection, such as
134 glands, swelling of glands within the area of the wound or area drained by the wound, and the treatment should also include taking the temperature and any evidence of local infection if there was any present.

The final consideration that the patient should be observed again within a reasonably short time. I would think within a period of 2, 3, 4 days at the most to determine the healing was satisfactory and there was no evidence of complications.

BY MR. FEISSNER:

Q. From your examination of the records in this case, the testimony you observed, did you find that there was a complication that presented itself in this case? A. Yes, sir.

Q. What was that complication? A. The analysis of the doctor's records indicate that in addition to the testimony that there was evidence of infection present at the time of the doctor's initial examination on the second of July, 1963.

MR. WELCH: I ask that the previous answer be stricken. If there is an infection, obviously, something else should be done. He said he had reviewed these records and was talking about what he saw from the records and heard in the testimony when he sat here in the court yesterday.

135 and, therefore, his answer is not what should be done in accordance with appropriate practice when you see the patient.

THE COURT: You will please disregard the answer.

BY MR. FEISSNER:

Q. From the record you have in front of you, what complications developed from the exhibits? A. There was an infection described present in the wounded area on the right forearm on the day of the examination on the second of July.

Q. Did anything else develop? A. Yes.

Q. What developed? A. There was a further description of an infection extending into the lymph glands, or dermatitis and lymphadenitis.

Q. Would you explain, sir, what lymphadenitis and dermatitis means? A. Yes, sir. In addition to the arteries and veins, there is a third circulatory system which drains tissue fluids away from a given area of the body and it is known as lymph. In reference to this system, which the doctor makes in his statement, the lymph drains away from the wounded area. The lymph channels terminate in glands grouped in various parts of the body.

136 In reference to this particular case, the glands under the arm and above the elbow would be the lymph glands and would normally be expected to be involved when the doctor used the term lymphadenitis. A medical observer would understand that this is inflammation of the lymph glands within the immediate region of the wound, presumably, above the elbow or under the arm.

Q. What other terms were referred to? A. Dermatitis. This is a general medical term denoting an irritation or inflammation of the skin.

Q. Are these considered usual or unusual developments in the treatment of an injury of this nature?

A. I am not sure what you mean by developments?

Q. These conditions. A. These conditions in a medical sense would be felt to be a complication of the initial wound.

Q. What treatment do you find that the record indicates was given by the physicians to overcome these unusual conditions?

MR. WELCH: There was no unusual condition described by the doctor. He said the conditions were a complication of the original wound.

THE COURT: Sustained.

BY MR. FEISSNER:

Q. Doctor, what treatment was rendered or what is the accepted
137 medical practice in this community when these conditions develop in a wound of this nature and an individual of this nature? A. Treatment is indicated.

Q. What is the indicated treatment, sir? A. This is a variable condition. Certainly, treatment would include an antibiotic preparation given by mouth to give a blood level of antibiotics in the body. It would also include, in this doctor's judgment, use of a dressing, a warm, moist dressing applied to the infected area.

Q. What is the purpose of a wet dressing? A. The heat is of value in reducing the inflammation and softening the tissue so that the antibiotics get into the area. These procedures were not applied at that time.

MR. WELCH: I am going to object to further detailed procedure in this manner. If this plaintiff desires to proceed by stating, in the usual form of a question -- I am going to ask for a hypothetical question so that this doctor may consider it and the jury and the court will know what he is taking into consideration by stating the fact of the injury, what the doctor did. He may then give a medical opinion in the usual manner. I object to this. It is not a proper way to proceed.

THE COURT: Sustained.

MR. FEISSNER: I understand your honor wants a hypothetical
138 question?

THE COURT: I have sustained the objection and that is as far as I am going. I think that we will take our morning recess at this time and I will give you time to frame such a question. Mr. Feissner, in asking the doctor a question, the way I have always understood the proper way to do it is to ask him a hypothetical question.

* * * * * *

147 BY MR. FEISSNER:

Q. Assuming that there was a 64-year old woman who had a history of high blood pressure, who stood five feet four inches in height, weighed 180 pounds; that she had a daily routine of house cleaning, baby sitting, shopping and related chores; and that on July 1, 1963 she went to the Safeway Store and there suffered a puncture type wound on her arm of approximately three centimeters in length; that this wound was from a wire basket which is in use at the store; that on the second of July, 1963, she went to her physician, Dr. Hantsoo, and there was treated with a debridement of the injury; a Band-Aid with an antibiotic was applied and she received pills for high blood pressure.

Assuming further, that she received a shot of tetanus toxoid on July 2

148 and then went to her home and at that time went to her bed.

That thereafter, according to her family observers, she became generally weak, feverish, dizzy and nauseous and her upper arm became somewhat inflammed, red and swollen and that the wound area became discolored.

Assuming further that on July 5, 1963 she was paid two house visits by her treating physician, Dr. Hantsoo, and on one visit the treatment rendered was to change her bandage.

Assuming further that she was seen by Dr. Hantsoo on July 8 and he changed her bandage and on July 12, 1963, she returned and he changed her bandage. That on July 12, 1963, he saw her again; that on July 15, 1963, he saw her again; that on July 18, he saw her again.

That the treatment that I have described to you, which is the treatment shown by the doctor's records, is the fact that the treatment rendered by the doctor that after the injury of July 1, 1963, and before July 21, 1963, when the patient went to Casualty Hospital in the District of Columbia, she developed a dermatitis on her right arm with lymphadenitis and fever; that thereafter she was observed by her relatives during this period of time from July 5 to July 21, 1963, to be in bed all the time with the necessity of having someone assist her to the bathroom or kitchen and

149 that she was generally weak, warm of body, dizzy, feverish and nauseous.

That her upper arm became inflammed and red and swollen about like a soft ball, an inch or inch and a half, and her lower arm, while it improved somewhat, was still red and the wounded area discolored.

That the general condition of weakness, fever, dizziness and nausea continued up to the time she was hospitalized on July 21, 1963, and that the swelling in her right upper arm, which was red, discolored and hard and swollen about like a soft ball, continued until her hospitalization on July 21, 1963.

That in her lower arm, the wound site was still present, although it had improved somewhat. The bandage had last been changed by the treating physician on July 18, 1963, when there was still some wound there.

On July 24, 1963, the patient, Mrs. Junes, expired, according to hospital records, from a CVA. Assuming the accuracy of the statements that I have just given you, assuming the accuracy with the qualifications expressed of the hospital records and of the two exhibits from the doctor's office.

Assuming further, that the treatment rendered by the treating physician, Dr. Hantsoo, on July 2, 5, 8, 12, 15, and 18, was that which I gave you and that which is shown by his office records, assuming those

150 facts to be true, can you express an opinion within the realm of reasonable medical certainty whether the care and treatment afforded by Dr. Hantsoo to this patient in this community was within the accepted

standards of medical practice in this community as existing between medical practitioners practicing medicine at a like time, recognizing that you are expressing your opinion within the framework of reasonable medical certainty? A. Yes, sir, I can.

MR. WELCH: May I ask what the qualifications of the records are?

MR. FEISSNER: The hospital recorded no history of injury and where there was no heart condition it was related to the blood pressure being somewhat related to the heart. It was that minor.

MR. WELCH: Didn't the court sustain an objection that the heart condition matter was not in this case? There was no testimony about it. And there is no qualification of the record, as mentioned before.

THE COURT: Does this have any reference to a heart condition? This record?

MR. WELCH: Does your honor know where it is he is referring? I don't understand this qualification. I did when you first gave it but I don't understand it now.

151 MR. FEISSNER: Your honor, the point that the doctor was making was only that the hospital record did not show any history of the injury.

Secondly, where it says no heart condition in the history here, that in fact hypertension, as I understand it, with the medications that were given, according to this doctor's records, would be considered a heart condition. If your honor understands what I am trying to say. It relates high blood pressure to the heart. It was a question of communication.

THE COURT: All right.

MR. FEISSNER: The medication here on the 11th of July 1962 is a heart medication and that is all I was trying to say here, sir.

MR. WELCH: There is no heart condition mentioned in this case by Dr. Hantsoo. It says, "No heart condition."

THE COURT: It says, "hypertension disease for several years," right in here. So, whoever it is who is writing this distinguishes between a heart condition, as such, and hypertension. I don't see that it needs any qualification. I don't know exactly where we are now.

MR. FEISSNER: The doctor merely related the word hypertensive and two medications on the original report as being that blood pressure is related to the heart. That is all he is trying to say.

152 THE COURT: I don't see where he got any qualification of the record. That is the thing I don't understand.

MR. FEISSNER: Sir, he was attempting to say because of the hypothetical that I gave him to assume that the records were accurate, but he wanted to bring to the court's attention that the record does not show an injury.

THE COURT: All right. That is the only qualification. Let us make that clear. The only qualification is that the record doesn't show any history of an injury. I don't see how that qualifies this record whatsoever. You have given him the history of the injury behind it.

MR. FEISSNER: This is what he was referring to when I suggested to the court that it was a question of communication.

MR. WELCH: He either accepts the records and gives his opinion based on them or doesn't. If he is going to start qualifying, the question is not proper.

THE COURT: Mr. Welch, I agree with you on this, but I want to avoid having to go through this whole thing again. The jury will get to the point where they won't pay any attention. Let us rectify this by asking that you note there is no history of an injury in the hospital records, but that, bearing in mind the history of the injury which you have outlined in your hypothetical question, and taking into consideration the records as they are can be expressed.

153 BY MR. FEISSNER:

Q. Doctor, recognizing that the hospital record does not have a report of the injury, by accepting all of the records as they are can you

express an opinion within the framework that I have given you? A. Yes.

Q. What is that opinion. A. There were areas in the medical career of this patient when the treatment did not meet the acceptable standards for the care of a condition of this sort.

Q. What, in your opinion, was the effect on the patient of these deficiencies?

MR. WELCH: I would like to know what the deficiencies are.

BY MR. FEISSNER:

Q. What are the deficiencies in medical treatment that you refer to? A. From the time of the development of the complications, notably the redness in the right arm, the glandular swelling or lymphadenitis, and the advent of the so-called systemic or general bodily reaction to a disease from that point on ---

MR. WELCH: There is no testimony that she had systemic or a body disease growing out of this incident. The doctor testified on the
154 stand that she had no systemic reaction. This witness is putting into the case matters not before the court in evidence.

THE COURT: My memory of this is as Mr. Welch has stated. I think that the answer which the witness has given should be stricken and I will order it stricken and I will order the jury to disregard that answer and let the doctor proceed and start again.

It must be within the framework of the evidence which is before you and which was given in the hypothetical question.

THE WITNESS: The question called for my opinion of these factors. Is my understanding correct, sir?

THE COURT: You can't clarify this question. You have to answer it yourself.

MR. WELCH: Is there a question before the witness?

THE COURT: I struck the answer and told him to start over again. I don't know any other way to respond to your objection, Mr. Welch.

THE WITNESS: The hypothetical statement included the fact that the patient was weak.

MR. WELCH: I object to a lecture by the doctor. The question is what are the deficiencies.

THE COURT: The objection is overruled.

THE WITNESS: The hypothetical case stated that the patient felt
155 weakness, dizziness, nausea and became feverish. This is documented in the memorandum and also from the statements in the hypothetical case.

These symptoms, in my opinion, are in fact systemic signs, therefore, my opinion is based on my feeling that these are indications of a systemic reaction or general body reaction to an infection occurring in this woman's right upper extremities.

It is from this time on, in her clinical career, that there was, in my opinion, failure to apply additional treatment measures which would have reduced this patient's current suffering and would have enhanced her likelihood of recovery.

These measures would be, at the time I described the development of these symptoms, would be use of a warm, wet dressing, possibly the use of antibiotics of an appropriate nature by mouth or injection. It might include cultures of the wound, taking a specimen of the drainage.

MR. WELCH: What it might include is improper.

THE COURT: Sustained. That part is stricken.

BY MR. FEISSNER:

Q. What would be the reasonable medical practice in this community by a doctor rendering a like service, expressing that service within reasonable medical probability?

MR. WELCH: Is this another hypothetical question?

156 THE COURT: Go ahead and proceed with the answer as to the deficiencies.

THE WITNESS: At the time this patient developed the complications I described in the record and the hypothetical question and the general systemic reaction, I said that further tests should be done.

These are the application of a warm, moist dressing to the infected area; the use of appropriate antibiotics after determination of the

type of germ or organism which is infecting the wound.

This could be done by taking a culture of the wound. In addition, if the patient did not respond, hospitalization or more intensive care than can be provided in the home should have been instituted.

BY MR. FEISSNER:

Q. Why should hospitalization be instituted in this case? A. There are several reasons.

Q. Recognizing, in answer to my question, that you expressed your opinion within reasonable medical certainty. A. First, this woman had a history of pre-existing diseases. The documents indicate that she had been treated for high blood pressure and had received medications for the heart -- digitalis, a type preparation known as Lanoxin and Peritrate

157 designed to relieve chest pain by improving circulation of the heart.

Considering that fact, considering her age, considering her failure to respond promptly to the treatment, I feel that hospitalization would be indicated in this type patient.

Q. What would the reasonable medical practitioner do with an individual who had a wound which was not healing as you indicated with hospitalization? A. Providing the patient was in the hospital and that all appropriate measures he felt were applicable had been applied and there was no response, it is customary, in this area, to ask for a consultation with another physician to aid in the diagnosis and treatment of the case.

Q. What is the necessity of a culture in a case like this? A. A culture of the wound, or in some cases of the blood in the body, is done when the infected area is not recovering on the normal schedule for this type thing. It may indicate that we are dealing with a germ that is a little resistant to treatment or a little difficult to isolate or identify and is one that is not going to be destroyed by the usual treatment.

In other words, something else is called for and in this case we take a little bit of the wound drainage and send it to the laboratory and see what

germ grows out of this wound and we test that germ against certain bloods
158 to see which one kills the germ best and if it is all right to use it in the patient you give that patient the medication which has been proved to work best against that infection.

In this case, it was understood that the patient had a penicillin allergy but there are numerous other antibiotics that could be appropriately used.

Q. What is the medical significance of her right upper arm being swollen and swollen hard and her body being warm and feverish during the period of July 1963? A. It is medically clear to me that this woman had one of several possibilities going on in her right arm. I would like to briefly explain it this way.

MR. WELCH: I object to that. He was asked what the medical significance was. He has answered the question.

THE COURT: Sustained.

THE WITNESS: This woman had at least two conditions going on. First, the wound on the right lower forearm became infected either at the time or immediate moment of her being injured by the wire, or immediately thereafter.

This produced a significant condition in that she had an infected area on the lower arm. At the time she first visited the physician on the second of July, the day after the accident, search of available records
159 indicates that the upper arm was not involved. It was, however, on the second of July she received a tetanus toxoid injection into the upper arm.

It was subsequent to this injection that a secondary process, or a second process, if you will, developed in the upper arm. This second process developing in the upper arm may bear the following relationship to the injury: (1) it could have been a reaction to the shot itself. Not a specific tetanus, antitoxin or allergic reaction, but what we call a post injection cellulitis, which can occur in any patient irrespective of the type medication given, and I think it is quite so.

I agree with previous testimony that tetanus antitoxin is one that produces allergies whereas, tetanus toxoid does not produce a specific allergic reaction, but it can produce a non-specific cellulitis in the arm.

This can happen to any patient, to any doctor giving any medication. It has no relationship to the medication. The first possibility of damage to the right upper arm was due to the reaction of the shot and had nothing to do with the lower right arm.

However, the possibility exists that the infection in the lower arm had now developed into what we call an ascending infection and was moving into the upper arm and involved the lymph glands so I considered, in my deliberations, whether this was in fact the case, that infection had
160 moved to the upper arm and she was not having a shot reaction but the infection had descended to this point.

The third is having them both going on at once. After considering these I felt the significance lay in the fact that the doctor who treated this case, who, after all, is in a good position to observe it, felt that she had had a reaction to the injection and that my analysis of the significance of this is that there were two conditions going on, related only in the sense that the upper arm process was initiated by the reaction to the treatment she received for the wound in the lower arm.

That is the way I would analyze the significance of the two areas of inflammation, one the lower arm and one in the upper. The lower due to the wound and the upper arm swelling due to the injection of tetanus toxoid.

I would like to comment on the tetanus toxoid. Another aspect of the records had failed to disclose any evidence of the woman having received a prior injection of tetanus, therefore, since it is commonly known that it takes from two to three weeks or more for antitetanus levels to develop, it would not be ordinarily expected that this woman would have any protection from tetanus toxoid injection. If she had had a previous tetanus toxoid injection sometime earlier in her life, the giving of tetanus toxoid

161 will bring back the immunity which the person had, but I would question the use of tetanus toxoid because of the time lag, and since we don't know whether she had a previous tetanus toxoid shot we don't know whether this was of value or not.

BY MR. FEISSNER:

Q. The deficiencies you have heretofore related to the court, do these deficiencies apply to treatment of lower or upper arms? A. They apply to both areas since the treatment of cellulitis, coming from the injection, is similar to that already in the lower arm.

Q. In expressing that opinion within the realm of reasonable medical probability and the accepted practice of the District of Columbia as it existed at the time, what, in your opinion, expressing that opinion in the manner I have stated, was the effect of these deficiencies on the patient?

MR. WELCH: Hasn't he already asked those questions?

THE COURT: No, I don't think he has.

THE WITNESS: Based on the records and testimony here presented, this woman presented a story of being confined, essentially, to her home when it was brought out that it was not her normal custom to do this. She had normally been up and about -- in fact, I understand working

162 to some extent. From the time of this injury she was substantially unable to get out of her home and there was some testimony to indicate that she was -- in part at least -- confined to her bed for a majority of the time.

The doctor's statement that she became feverish and his additional statement that she was too weak to come to the office, I believe, was the term he used, would seem to document the patient's continuing weakness and inability to navigate in a normal fashion.

This condition persisted from at least the fifth of July until approximately the 18th of July, apparently, because she was unable to go to the office on these occasions.

The testimony of the relatives gives some indication that there was continuing weakness and some degree of disability at that time. My

opinion is that the application of the treatment measures I had discussed previously at an earlier time in this woman's course would have shortened the course of her disability and illness and greatly enhanced her likelihood of recovery.

THE COURT: There is no indication in the records any place that she suffered from a tetanus infection, is there?

THE WITNESS: No, your honor.

163 THE COURT: Then, what difference does it make whether she got tetanus antitoxin or tetanus toxoid? It was a precautionary measure, wasn't it?

THE WITNESS: Yes, sir, but the giving of it when it would not give the same levels medically ---

THE COURT: As long as none developed, it had no significance at all, did it?

THE WITNESS: Yes, it did. I feel this was the cause of the swelling in her right upper arm -- it was brought on by the shot which was indicated by the fact that she had sustained the original injury.

BY MR. FEISSNER:

Q. Expressing your opinion within the realm of reasonable medical probability, was the deficiency of reasonable treatment, on the ultimate demise of Mrs. Junes, responsible? A. I believe there was a relationship.

Q. Expressing your opinion within the realm of reasonable medical probability, what was the relationship between her death and the injuries she received, with the subsequent treatment by the physician you have delineated to the court and the jury? A. If I may give an explanation with my answer: there is a relationship, but I would like to, if I may --

Q. Explain what the relationship is. A. The exact cause of what

164 we call a cerebral vascular accident you cannot specify or pinpoint -- you cannot specify or pinpoint a cause that this item always causes stroke. We can list who is more likely to have a stroke or under what conditions, but it is very difficult to pinpoint one cause as the cause of strokes

so that when we scrutinize this case -- I was trying to determine if there was a reasonable relationship or any relationship here. My reasoning went this way.

MR. WELCH: I don't think that is a proper way to testify.

THE COURT: Sustained.

BY MR. FEISSNER: Would you answer the question? What is the relationship between the deficiencies of treatment and the ultimate demise within the realm of reasonable medical probability? A. Her failure to receive adequate treatment and promulgation of her illness during the period between the 5th of July and the 24th of July was an aggravating factor in her demise.

Q. Are you expressing that opinion within the realm of reasonable medical probability? A. Yes, sir.

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CROSS-EXAMINATION

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BY MR. FEISSNER:

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169 Q. Did you ever see the deceased, Mrs. Junes? A. No, sir, I did not.

Q. And when were you first contacted concerning this matter? A. I believe, to the best of my recollection, some time in early 1965.

Q. And who contacted you? A. Again, to the best of my recollection, I believe the attorney either called me or sent some doctor to my office for me to review.

* * * * * *

176 BY MR. WELCH:

Q. Doctor, at the time of your deposition were you asked these following questions and did you give the answers? On page 45, doctor. I have asked you to stop reading. Just pay attention to me. On page 45, beginning about the middle of the page.

"Question: Is there anything else, doctor, that Dr. Hantsoo should have done, in your opinion, that he didn't do? Answer: This is prior to her going to the hospital? Question: Right. Answer: Only indirectly. If he had not hospitalized her for one reason or another, or had not felt it necessary in his opinion, he could have done more at home by way of putting warm applications and warm dressings to the area and administering antibiotics.

"Question: Isn't this a question of judgment, he being there and being able to see the wound? Answer: I am trying to give you my judgment and he demonstrated his judgment." Did you give those answers? A. Yes, I did.

Q. So, at the time of your deposition, with respect to what Dr. Hantsoo did up to the time of the hospitalization, you agreed that it was a matter of judgment what the physician did at that time? A. Yes, with

177 the other statements that I made. However, I think there is one correction, sir. The word ---

Q. Doctor, there needn't be any correction in that question and answer. They are there and they speak for themselves and you said that you gave that answer.

THE COURT: Isn't that all there is to it?

THE WITNESS: Your honor, I said "could have done," not "should have done," at this time.

BY MR. WELCH:

Q. But you didn't advise counsel or the court before it was filed that there was anything to be corrected. You weren't working through an attorney at the time? A. I made several other corrections.

* * * * * *

181 Q. With respect to the deposition, doctor, in the questions you were asked concerning what Dr. Hantsoo had done, coming to page 47, were you asked this question and did you give this answer?

"Question: I am talking about what he did. The treatment of the wound, bandaging and giving the tetanus shot. Not the things he indicated

182 he did here are acceptable and within the usual medical standards, I would say." Question: You find no objection with the administering of the tetanus toxoid? Question: You find no objection with the administering of the tetanus toxoid? Answer: No, sir."

Did you give those answers to those questions? A. Yes, I did.

Q. Have you examined the hospital record for the final admission which was 7/21/63 to 7/24/63? A. That is right.

Q. I assume you saw on the examination page recorded the 1:30 p.m. on July 21, temperature 98; pulse 85, and respiration 25, is that right? A. Yes, sir.

Q. Was that a normal temperature? Just answer the question yes or no. A. I am afraid I can't answer.

* * * * * *

183 Q. Did you find in this hospital record any reference whatsoever to Mrs. June's hand or arm? A. No, sir, I did not.

Q. You referred to a memorandum signed by Dr. Hantsoo, dated November 4, 1963, in which he made some statements about Mrs. June's condition. After stating that she had injured her arm, she came to him for treatment of the laceration on the right forearm. He stated, and I read from his statement, "There was an inflammed (infected) laceration on her right forearm. The laceration was about three centimeters long with uneven edges.

"After debridement, a bandage with an antibiotic was applied. Despite the use of an antibiotic the patient developed a dermatitis on her right arm with lymphadenitis and fever. The patient's condition improved

184 slowly and the laceration healed."

Did you take that into consideration in giving the statements you have given this morning on the witness stand, or did you only take into consideration the things you mentioned when you referred to that statement, namely, that he used an antibiotic ointment and dermatitis -- A. As I previously stated, I considered all documents in their entirety.

Q. Would you consider that the fact that the doctor said the patient improved slowly and the laceration healed to mean the laceration had cleared up to the point where it was of no consequence? A. That would be an interpretation.

Q. In other words, interpreted to suit yourself, rather than what it said, is that right? A. We review all the records and evaluate and interpret them to the best of our ability.

Q. You didn't give any consideration to the fact that Dr. Hantsoo was treating this patient, taking care of her, saw her, observed her and came to this conclusion. You interpreted differently. A. No, sir.

Q. But, you did come to a different interpretation. A. No, sir, I haven't stated that I have.

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REDIRECT EXAMINATION

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197 BY MR. FEISSNER:

Q. Doctor, these questions, what is the usual prognosis in a case of this nature?

MR. WELCH: This is all part of direct examination.

THE COURT: I think he has testified to this already.

MR. FEISSNER: Not as to this question. I believe he testified to deficiencies and causations, but I did not specifically ask him what the usual prognosis was in a case of this nature. It is my last question. I asked this because of the nature of the cross-examination, sir.

THE COURT: The thing that bothers me is that I don't see how you can have a usual prognosis. A prognosis refers to what may be anticipated with respect to a particular patient and a particular time. I don't think there is any such thing as a usual prognosis. I just don't see how he can testify as to that.

MR. FEISSNER: The question I would offer to the witness is what an individual of this sort, having an injury of this nature that is described, what, medically speaking, would be the normal course of events

within reasonable medical care and attention? What the usual prognosis would be.

THE COURT: You are talking about a certain person on the
198 basis of a definite record and I don't think you need to go into the abstract as to what the usual prognosis would be.

MR. FEISSNER: In a person of this nature, is what I am referring to. I am not referring to someone in the abstract.

THE COURT: But you are talking about the usual prognosis for a person of this nature, and so forth. It is like talking about the mortality tables. You may say that I have a life expectancy of a certain amount, but I may go out on the street and get hit by a truck on the way back to the hotel. This isn't a place where I think we can enter into speculation.

MR. FEISSNER: May my question be accepted as an offer of proof? I got the question from the law and from the law books.

THE COURT: If you want to ask the question or Mr. Welch wants to object I will sustain the objection. Put the question. Do you object to this, Mr. Welch, and the objection is sustained.

MR. FEISSNER: May I make an offer of proof, sir, at a time convenient?

THE COURT: Are you through now? Is there anything else of this witness?

(There was nothing further.)

199 THE COURT: Then, we will take our afternoon recess at this time and I will excuse the jury. Then you can make your offer of proof.

(The jury is excused)

MR. FEISSNER: If your honor please, we offered to prove by Dr. James Chapman that the usual prognosis of injuries of the nature of which the decedent had in this case, with reasonable and appropriate medical care, would be a complete healing from a period of 7 to 10 days.

We rely as authority for our offer of proof in asking this question Chambers vs. Tobin, Court of Appeals, District of Columbia, referred to as 204 Fd. 2d., 732, where the court held that it is a proper question in malpractice action, is a question of what the usual prognosis would be as related to the particular individual.

THE COURT: Do you want to say anything in regard to this?

MR. WELCH: No, sir. This case was one of my cases. I am quite familiar with it. I don't think it has any bearing on this situation. In the first place, I might add this: that if he had asked the man what was the prognosis of the case in his direct examination as he should have, I would not have had any objection.

But he waits until after cross-examination and a lot of going back and forth and going back over records and asks it out of context and
200 puts an entirely different light on the situation.

THE COURT: Well, I will tell you what has me somewhat puzzled. Dr. Chapman says, for instance, that he would think that if a person hadn't had a prior shot of tetanus that the doctor knew about that and that he would give the person, if he was going to give any kind of shot for tetanus, a different type that would act more quickly.

I suppose maybe there isn't, but I don't know what the evidence is on this. I judged from what was said by Dr. Hantsoo that if you gave the antitoxin instead of toxoid that you would have the risk of an allergic reaction and the toxoid didn't give that.

The reason that it is suggested that that type of shot be given instead of toxoid is that she would have the benefit of it more quickly in her system. In other words, if she didn't have tetanus, while it was good medical procedure to do one or the other, it seems to me that if there is no harm coming from it one way or another that then there is nothing to complain about.

In other words, the doctor might give a person absolutely the wrong treatment, but if he wasn't hurt by it he has nothing to complain about, except he could go to a different time. So, I lost track of the

importance of this shot.

201 Now, as to the cut. If you assume for the sake of argument that the cut healed by the time that she got to the hospital, then I don't see how that affects it, that is, what she has to complain about there even if some other better treatment might have been employed, such as putting on hot packs, and so forth, which would result in possibly a 7-day recovery period instead of a long one.

Now, that is all you are proposing to put on by this testimony. Now, of course, if either of these things resulted in her death, then you have a wrongful death, with compensation for wrongful death.

I don't see that if you want to call it a prognosis of 7 days, as against the time it actually took if it healed, makes any difference. You can't give damages for pain and suffering on that period, so there isn't anything to recover on that count.

The doctor has expressed himself that he thought that this sort of put a strain on the system in some way.

MR. FEISSNER: The testimony was that it was an aggravating factor in the cause of her death and I think the point I was trying to make, sir, was to demonstrate that the failure of this healing in a normal period of time -- what would be a normal period of time -- is further indicative that a reasonable, prudent physician would have done something else.

202 After a period of 7, 8, 9, 10 days, the reasonable and prudent physician will look further into the situation, assuming you have someone with an arm that is hard, red, and hot, with fever and lymphadenitis and cellulitis. You just don't keep her home and wait for something to happen, sir.

THE COURT: Well, I think that I will stick by the ruling made and I think in the record already is the doctor's opinion by adopting a different type treatment it would have healed more rapidly.

(Recess.)

(The jury returns.)

THE COURT: On the record.

Whereupon,

ALFRED WAGNER

was called as a witness, and after being duly sworn upon oath, was examined and testified as follows:

THE CLERK: What is your full true name, sir?

THE WITNESS: Alfred Wagner.

DIRECT EXAMINATION

BY MR. ROBERSON:

Q. You are Dr. John A. Wagner? A. Yes, sir.

Q. What is your residence address, sir? A. 115 Overhill Road, Baltimore.

Q. Dr. Wagner, what is your professional occupation? A. I am
203 a pathologist. Specifically a neuropathologist.

Q. What is neuropathology? A. It is a branch of medicine which deals with diseases in central and peripheral nervous systems.

Q. Would you outline for us your qualifications for that speciality? A. I am a graduate of the University of Maryland School of Medicine in 1938. I served a two-year internsnip and one year of residency in internal medicine, the internship being at the University of Maryland Hospital and the residency in medicine at the Mercy Hospital in Baltimore.

Following that I served as doctor and fellow in pathology and later as fellow in neuropathology in the University of Maryland, ultimately, being appointed to the staff of pathology where I have been since then.

In 1956 I was granted full professorship and since that time have directed the division of neuropathology, a subdivision of the Department of Pathology, in the School of Medicine and the School of Medicine Hospital. I was certified by the American Board of Pathology in 1947.

Q. What does that signify? A. It is a special examination and certification as specialist in pathology and neuropathology.

Q. Do you know a Dr. Leonhard Hantsoo, who is practicing in Washington, D. C.? A. No, sir.

204. Q. Do you presently teach medical students? A. Yes, sir.

Q. Is that your full time occupation? A. Not entirely.

Q. What do you do in addition to teaching? A. In addition to teaching I am responsible for all of the regular examinations of neurological specimens from the medical, surgical and neurological service of the University of Maryland Hospital. I served as consultant of a number of other hospitals: Walter Reed Army Hospital here in Washington, with regard to diseases of the nervous system.

Q. As a consultant, what is your function? To diagnose or treat? A. To diagnose.

VOIR DIRE EXAMINATION

BY MR. FEISSNER:

Q. Doctor, do you practice at all in the field of medicine, or is your work teaching and consulting? A. I am strictly within the field of pathology. I do not practice medicine, clinical medicine. I don't treat patients. Pathologists are doctors. Our work concerns chiefly the problems which physicians encounter with regard to illnesses of their patients, be they alive or, unfortunately, deceased. It is our job to examine

205 the material cases and to advise them concerning the nature of the disease and its complications.

Q. You have not treated patients since 1947? A. Clinical cases.

Q. Doctor, do you practice at all in the work that you do in any of the hospitals, the public hospitals in the District of Columbia? A. No. The only connection I have in the District of Columbia is Walter Reed Army Hospital where I serve as consultant in neuropathology only.

Q. And you are with the University of Maryland in Baltimore? A. That is right.

Q. That is all I have.

DIRECT EXAMINATION (Resumed)

BY MR. ROBERSON:

Q. At my request did you have occasion to examine some records with respect to Mrs. Bessie Junes? A. I did.

Q. Did you examine the hospital records covering her two hospitalizations at Casualty Hospital, including the terminal hospitalization, a photocopy of Dr. Hantsoo's office notes, a memorandum he wrote in November 1963 concerning her care and treatment before her death?

206 Did you also read all the depositions of her daughter and her sister and did you read the summary of Dr. Chapman's deposition and Dr. Hantsoo's deposition? A. I did.

Q. Dr. Wagner, as a result of studying the records with respect to Mrs. June, have you a professional opinion as to the cause of her death on July 24, 1963?

MR. FEISSNER: We would object to anything the doctor has read, outlines of depositions of people or things of that nature. I think the court has requested that any opinion be based upon a hypothetical of what was here in this courtroom, and for that reason, we object.

THE COURT: The objection is overruled.

BY MR. ROBERSON:

Q. What is your professional opinion, Dr. Wagner, as to the cause of Mrs. June's death?

MR. FEISSNER: There is no basis stated for the fact ---

THE COURT: This is a different situation than the questions that you were asking and the objection is overruled.

BY MR. ROBERSON:

Q. What is your opinion? A. My opinion, from the examination of the medical records, is that she died of a intravascular cerebral

207 hemorrhage relating to some disorder of the vascular system resulting from her long-standing high blood pressure and its complications.

Q. In lay language, is there a lay term for introvascular cerebral hemorrhage? A. Yes, sir. The blood vessels which supply the brain are continuations of the main blood vessels and the branches which come from the heart. In patients who suffer from high blood pressure, particularly those who suffer for a reasonable period of time, or a number

of years, these vessels are involved with a disease known as arteriosclerosis, but it means that deposits of a chemical, and some times hemorrhages occur in the walls of the blood vessels causing them to become narrow or weak or both.

In the case of continuing high blood pressure these vessels, which are predisposed to weakness or partial destruction of their walls, undergo two possible changes. Either a rupture and the blood leaks out into the brain, or they become stopped up like a rusty water pipe and the blood doesn't flow through them any more.

This results in what most of you have already seen or know about as what is called a stroke. In other words, "stroke" itself doesn't mean anything. It is a term and merely means that the patient has been stricken, but what goes on inside is one of two things, and very often a mixture of
208 both. The blood vessel shuts off and the brain, being deprived of its nutrition, dies and becomes soft and will never function again.

That part of the brain which activates the muscle by way of the spinal chord and nerves which lead to the muscles is thereby irreversibly or permanently killed and the patient is unable to move the parts affected.

Now, in the case of hemorrhage, the blood flowing through this very soft brain material cuts these little fibrils that lead from the nerve cells down ultimately through the long pathways, out through the muscle, cuts them and the result obtains.

In other words, the hemorrhage may be down deep in the brain cutting the fibrils that run from the nerve cells ultimately to the muscles or the blood vessels may become plugged and deprive the nerve cells of functioning and they die, the end result being the same thing.

The patient is paralyzed. The phenomenon of being paralyzed on one side is an anatomical one. The part of the brain which operates the right side is apt to be the left side, so if the softening or hemorrhage is on the left side and the weakness is on the right and vice versa because they cross on the way down.

Q. Which of these, if you have an opinion, did Mrs. Bessie Junes die of? A. I feel she died of an adding up of the signs and symptons as

209 narrated in the medical history. It would appear to me that she had a cerebral hemorrhage, the reason being that the onset was fairly rapid.

She was unconscious when admitted to the hospital and showed a progressive deterioration and gradually became worse -- putting her in an oxygen tent, suctioning her out -- initially, over a period of a few days, despite all the treatment, she died.

The natural course of many of these strokes is that we know about 3/4ths of them reach their peak within a few hours and then gradually, over a long period of time, improve, but 1/4 of them do not show improvement and die forthwith despite all treatment and efforts to save the patient.

Now it seems, therefore, most reasonable that this patient suffered a cerebral hemorrhage rather than a thrombosis. However, such a condition could co-exist.

Q. Tell me this, doctor, you saw in the records of Dr. Hantsoo that he treated her on July 2 subsequently for a scratch on the forearm that she got in the Safeway on July 1, 1963, did you notice that? A. Yes.

Q. Do you have an opinion, doctor, as to whether that scratch on the arm had any relationship as to the lady's death? A. I do.

210 Q. Why? A. I believe there is no relationship.

Q. What is your reasoning in ruling out the scratch on the arm? A. The reasoning is that I find that the scratch is superficial and the irritation or mild infection was local and that it had apparently subsided at the time that this cerebral stroke occurred.

I believe that the doctor's records say that the wound had healed and, furthermore, I am unable to find any mention of it in the hospital records or final admission, which was not for an infected arm but for the stroke.

Q. In the hospital records, doctor, did you note what her temperature was when she was admitted to the hospital? A. It was

normal, as I remember from the records.

Q. Did this lady show any evidence, from the hospital records, that she was suffering from a systemic infection on admission? A. There is none evidenced from the chart.

Q. What is the normal temperature? What is the significance of the normal, ruling out systemic infection? A. If the patient had systemic infection we would expect to find a reasonable history antedating the admission and evidence of infection at the time of admission -- high
211 fever and some sign of an infection. You just don't have an infection by itself, omitting a few very rare things.

There would be local evidence of where the infection was coming from had it spread systematically. I noticed nothing in the chart about that.

CROSS EXAMINATION

BY MR. FEISSNER:

Q. Obviously, you never saw the patient. A. No, sir.

Q. Did you examine pathologically any portions of her body? A. No, sir.

Q. You did not examine her? A. No, sir.

Q. To your knowledge, the doctor did not do an autopsy? A. That is not on the record.

Q. Then it would be fair to say to your knowledge there was none? A. That is right.

Q. You stated in forming the opinion you formed, you utilized the hospital records and the office records of the treating physician, Dr. Hantsoo, and the letter of November 4, 1963. The first question I wish to
212 ask you in line with those, did you observe, in your examination of the hospital records, that she, soon after her admission, had a temperature recording of 102? A. I don't.

Q. Do you recall such a thing? A. A temperature reading of 102? I believe her temperature was elevated prior to death. She was in the hospital but a short time.

Q. Would you be kind enough to tell us whether her temperature was 98.8 on admission and within 12 hours it had risen to 100.

Then on the second day from 102 to 104 where it remained with but a very small excursion down to about 103 until her demise on the third day?

Doctor, keeping the record in front of you, if you would. A temperature is an indication of a fever, is it not? A. Yes, sir.

Q. Now, doctor, looking at these records did you observe that any lumbar puncture was done? A. I never did see a record of one.

Q. And, doctor, as a doctor I wonder if you would be kind enough to explain to the court and the ladies and gentlemen of the jury what the function of a lumbar puncture is in a situation like this. A. The function

213 of a lumbar puncture I wouldn't know in the case of a stroke of this type in a patient who was so profoundly unconscious. It conceivably could make a patient worse.

Q. Isn't it normal procedure to see if there is any blood in the spinal fluid, sir? Isn't that the whole procedure? A. There are two answers to it.

Q. Let me ask you one. In a situation where the person is presented to a hospital in an emergency situation, is it not the generally accepted procedure, generally accepted, that a lumbar puncture is done to determine if, in fact, there is any blood in the spinal fluid? A. As a routine, no. Until it is reasonably ascertained what one is dealing with and the patient shows some stabilization or progress in one way or another, speaking clinically, it is potentially unusual to hazard the patient with a lumbar puncture or, if there is some type of mass swelling such as a tumor, a demise can follow one of these.

If a physician feels that this patient does not have an expanding intracranial mass then he may, at his discretion, perform a lumbar puncture but as a routine I think it is very dangerous.

Q. Where there is no suspicion of an intracranial mass, isn't a

214 lumbar puncture done? A. No, sir, not if you suspect a swelling, tumor, or large hematoma.

Q. Did you find anything in this record where anyone suspected a hematoma? A. There is nothing specifically mentioned. Their thought here is that she had a stroke, the softening or hemorrhage inside the

brain, and it is evident that tney were treating her for this.

It is evident that she had a continued deterioration. Her respiration became labored and irregular and she had to be suctioned and respiration dropped way down to ten, her pulse rate rising. These are the chart's signs of approaching death.

Q. Coming on very rapidly? A. This temperature curve is not a septic curve, as we call it in medicine. That is not the temperature pattern of an infection. It is a temperature pattern of what is known as diencephalic state.

There are certain areas of the brain that control blood pressure, control temperature and control a lot of different body functions and these are very delicate mechanisms lying at the bottom of the brain and when there is a serious disturbance going on, as is evidenced from the short lived clinical course of this patient, many of these vital centers become

215 disturbed and lose their habitual function and it isn't unusual to find temperatures of 106 and 109 in the terminal days of such a patient's life on this earth, and this chart indicates to me such a pattern rather than one of infection.

Q. Doctor, as you read the chart, the patient came in in an unconscious condition? A. Yes, sir.

Q. And, as you read that chart, the individuals at the hospital who received her, did they have knowledge or not have knowledge of what the cause of her unconsciousness was? A. The nurse? I really don't know.

Q. Doctor, in your examination of that chart, did you observe that a cardiogram was ordered? A. Yes, sir.

Q. Was it done? A. Yes. Here it is.

Q. Is there any advice given by the individual who took the cardiogram? A. Follow-up tracing.

Q. Do you find that any follow-up tracing was done? A. No, it was not.

Q. Doctor, in your examination of this record, do you find that a blood culture was taken? A. No, sir.

216 Q. In your examination of this record are you able to determine that on approximately the second day or, if you will bear with me, approximately 10 hours after her admission it was discovered that this woman had a latent case of diabetes? A. I won't go into saying that she had a latent case. She had an elevated blood sugar and she may have had a little diabetes. Certainly her acitone content of her urine was not spectacular and she may have had a bit.

Q. Didn't she have a four plus blood sugar in her urine? A. Yes. I would have to check exactly the time the urine was taken because she had intravenous fluids.

Q. Didn't she have a blood sugar the next morning that proved she had a diabetic state? A. On July 24 it was 193. That is elevated.

Q. Doctor, you have indicated for the court and ladies and gentlemen of the jury that you read the deposition of Dr. Hantsoo and portions of the deposition of other witnesses.

Do you recall, in reading that deposition of Dr. Hantsoo, that insulin was given to this woman while she was in the hospital? A. Yes.

Q. Am I correct that insulin is the normal treatment for diabetes?

217 A. Not necessarily.

Q. Would you agree or not agree that an individual who has a diabetic state that in fact healing takes a little longer with somebody in a diabetic state than someone who does not have a diabetic state? A. This is a popular concept. If there is infection and the diabetes goes out of control, the patient usually develops a profound spreading infection, great prostration, high blood sugar and coma resulting from the uncontrolled infection, but the fact that a lesion would heal would indicate that the diabetes was insignificant or there was little or no infection present.

Q. I take it by your answer you would agree with what I said, that an individual who does in fact have diabetes that their body does not heal as quickly to a suture outside of their bodies? A. In the absence of infection? Not necessarily. With infection, yes. It is likely to put the diabetes -- it is likely to make it worse.

Q. And the infection magnifies the diabetes, does it not, and puts quite a strain on the patient. A. Not necessarily.

Q. Where you have an individual with infection and diabetes, does not the infection put quite a load on the diabetes which, in turn, puts quite

218 a load on the individual? A. Not exactly that way. Any disorder, any emotional stress will put a strain on the individual.

Q. This is not emotional. A. A patient who has severe diabetes is no more prone to have delayed wound healing than anyone else. However, if the wound becomes infected -- and usually these are on the lower extremeties -- the infection may make the diabetes considerably worse and the infection becomes relatively uncontrollable and severe drastic means are often necessary to control the infection and the diabetes together, and this usually produces an enormous local infection systemic reaction and at the same time an exacerbation of the diabetes.

The diabetes does not remain subtle and under the circumstances, the wound does not heal except with the most astringent regimen in the hospital.

Q. You have to get them to the hospital on the ball? A. In other words, the wound itself does not heal and the diabetes is aggravated by the infection, but not by a severe infection, which is obvious upon admission to the hospital -- not something which existed three or four days ago. A wound heals and then someone finds a relatively mild form of diabetes. Many of us at 65 have that.

Q. In your reading of the deposition, did you observe the testimony of Dr. Hantsoo giving her insulin? The test showed the high blood

219 sugar and four plus urine. A. Yes.

Q. Now, sir, as you have stated --- A. Remember there are other treatments but this patient was unconscious. This is certainly indicated.

Q. No, doctor, when you suggest that the question of infection reacting with diabetes, are you aware that Mrs. Junes' arm was in fact infected? A. Technically.

Q. Not technically. Actually. A. According to the medical testimony the lady scratched her arm. It bled. She received medical treatment and it subsequently healed over a period of a few days.

Q. Healed over a period of a few days? A. I don't know the exact number of days, but it was reported to be healed by her physician and that is the point at which I forget -- it was not noticed on admission. So, if it had any relationship at all, the hospital attendants would have noted it.

Q. You say it healed in a few days. Are you aware of the fact that this injury occurred on the first day of July 1963; that the physician came to this woman's house and changed her bandage on the fifth of July, 1963; that one of the reasons was because it was infected and smelling;

220 that thereafter he came back and changed the bandage again on the 12th of July, the 15th of July and the 18th of July. He still had to change the bandage again.

MR. WELCH: Just a minute, doctor. I object to the question. He said the bandage was changed because it was suspected of smelling. The doctor said if a bandage is left on a wound, which has an infection, it may smell and therefore you change it, not that the wound was suspected of smelling.

THE COURT: I think that is correct.

BY MR. FEISSNER:

Q. Changing the bandage on the 18th, and your reading of the deposition of the attending physician, you would concede that the wound had not been healed at least 17 days after the event? A. I don't know what day it was healed.

Q. I understood you to say two or three.

THE COURT: He didn't say two or three. He said a few.

THE WITNESS: The main point I was making is that at the time this patient developed her stroke this wound had been healed and it is my impression -- I have not talked with the doctor -- it is my impression that as far as the scratch was concerned, he had dismissed and discharged her as being healed.

221 There may be differences in here but I cannot supply them. The only thing is what I gathered from reading the medical notes, it had healed. Following this, she developed a stroke and was taken to the hospital and forthwith succumbs.

BY MR. FEISSNER:

Q. Doctor, did you receive information that something had happened to her upper arm as well as to the lower arm? A. No, I don't know about that.

Q. You were not told or your information does not show there was something? A. I may have omitted the upper arm.

Q. Was your attention invited to the fact that something had happened to the upper arm of Mrs. Junes? Not only the lower arm where she had the cut but something had happened to her upper arm during the period of July 5, 1963 to July 21, 1963? A. I recall there was something about swelling following the tetanus.

Q. What is it you recall? A. That the arm swelled following the injection of the tetanus toxoid.

Q. When did that go away? A. I don't know.

Q. Was it of any importance? A. I don't know.

222 Q. What was the degree of swelling? A. I don't know.

Q. What is cellulitis? A. It is an inflammatory reaction of tissues.

Q. Is it a serious matter? A. Not necessarily.

Q. Is it a serious matter if it is associated with an infection in a diabetic? A. In an infection it could be.

Q. Is it a serious matter if associated with a diabetic with fever? A. Not necessarily. It is where there is a bacterial infection involved and whether or not healing takes place.

Q. Sir, wouldn't one determine whether there was a bacterial infection by doing a blood culture? A. No, sir.

Q. How would a doctor determine the bacterial infection? A. Almost every abrasion has some type of infection and if there is great prostration and symptoms I think such would have been noticed, and the

patient would have exhibited signs of sepsis long before the wound healed and the wound wouldn't heal.

Q. Doctor, would signs of sepsis be that there would be a great
223 inflammation, swelling, red, hard as a rock, looking like a soft ball, an inch to an inch and a half swelling out? A. You are getting too hypothetical for me.

Q. I am getting actual. A. I cannot comment on that. As far as I can see from the office records --

Q. I am not referring to the office records. I am asking a special question in line with your testimony. You said as to sepsis, or meaning infection, sir, that it is not an occasion of infection, an upper right arm that is swollen, red and hard as a rock, swollen out like a soft ball an inch to an inch and a half high. Is that a sign of infection in sepsis? A. Not after an injection of tetanus toxoid. You can get quite a reaction from the chemical and it disappears over a month or so. It is an expected reaction. I can't tell you how much or how long.

Q. What about its reaction with infection in the lower arm? A. They have nothing to do with each other.

Q. After the injection of tetanus toxoid, the two may coexist. What is dermatitis? A. It is an irritation of the skin.

Q. It would be irritating to pinch the skin. Would you consider that dermatitis? A. Dermatitis can come from adhesive tape.

224 Q. What is lymphadenitis? A. Lymphadenitis is an enlargement of the lymph nodes.

Q. What causes that? A. A variety of things. It could react from a minor infection. It could react from any irritative phenomena. It could even come from the shot.

Q. Do you know when the inflammation of Mrs. Junes' arm subsided? A. Only from the doctor's notes. I would have to refresh my mind.

Q. Would you be kind enough to look at the doctor's notes?

THE COURT: What exhibit is it?

MR. FEISSNER: Exhibit 12, your honor.

THE WITNESS: It says, "Bandaged on July 18th. To Casualty Hospital. CVA," and loosely, "July 24, 1963 and died."

BY MR. FEISSNER:

Q. You were going to show us on there where it show that the swelling subsided. A. Your honor, the attorney wishes to have from me a specific statement from the record as to where I got the notion that the swelling subsided and the approximate time. I am afraid I will have to go back to the records and reread them, although it is in my recollection that
225 somewhere in this record it states that the wound had healed.

THE COURT: I think we have all the records here.

BY MR. FEISSNER:

Q. You stated in response to counsel's question that you also read the deposition of Mrs. Idian and Mrs. Zimmerman. Did you find, in their testimony, that this thing had subsided? A. I read that but this is all hypothetical. From a pathological point of view, I would prefer to accept medical testimony before the lay testimony. Let me base my decision on that.

Q. The medical testimony in the record that you presently have in your hand does show that an unconscious person was brought into the Casualty Hospital. A. That is right.

Q. Medical testimony is indicative that the individual received insulin for diabetes. A. That is right.

Q. The medical record shows, does it not, sir, that the individual that was here had a cardiogram ordered and the doctor suggested that it be done but it was not done, is that not true?

MR. WELCH: We have been over this.

THE COURT: It is cross examination.

226 MR. ROBERSON: I think he has gone outside the scope of my direct.

THE COURT: The objection is overruled.

BY MR. FEISSNER:

Q. Would you answer the last question? A. This may have been because of some situation which the cardiologist did not exactly -- maybe he wanted it for his own purposes. This has no direct bearing on the case. Abnormal electrocardiograph changes are consistent with digitalis effect. A follow up tracing was suggested.

Q. Was one done? A. It was not done. There was no indication for it.

Q. No indication? A. No, not yet. It was done on the patient ---

Q. She died the 24th. A. Unless they thought she had a heart attack. This is the hospital admission and I don't believe there is anything in that one.

Q. Let me ask you another question and that will complete my examination. Doctor, the testimony that you gave the ladies and gentlemen of the jury about whether she had a cerebral hemorrhage is based upon the history you have from lay people as well as from the medical findings, although you didn't examine any portions of her body. A. I didn't
227 examine the patient.

Q. Or any portions of her body? A. No, I didn't see the patient living or dead. I am basing this on the physical findings and symptoms which are recorded in the medical testimony. I have read the other but I prefer to take this on evidence on which I am to base my professional opinion.

Q. And are you considering, in your professional knowledge, that this lady had an infection where she was injured in her arm and thereafter had lymphadenitis and cellulitis, a hard swelling and that this swelling continued until her hospitalization on July 21, 1963, and that she was a person who had a diabetic state and did not receive insulin until she went to the hospital? Are you considering those? A. No.

(Witness excused.)

Whereupon,

ELMER HERNDON MILLER

was called as a witness and after being first duly sworn upon oath, was examined and testified as follows:

THE CLERK: What is your full, true name, sir?

THE WITNESS: Elmer Herndon Miller.

DIRECT EXAMINATION

228 BY MR. FEISSNER:

Q. Do you live at 412 South Barton, Arlington? A. Yes.

Q. Directing your attention to the first week in July, 1963, were you employed by Safeway Stores? A. Yes.

Q. You were a butcher, and I assume you still are, sir? A. Yes.

Q. In the first week of July, 1963, did you have occasion to treat or to assist a lady who had a cut on her right arm in the Safeway store in which you are employed? A. Yes.

Q. Where was that store? A. 12-16 7th Street, Northeast.

Q. You were in the meat department at that time? A. I was in the meat department.

Q. How was your attention directed to the scene? A. Mr. Perkins, the grocery manager, brought a lady to me and asked if I would take care of her.

Q. In response to Mr. Perkin's request, what did you do? A. I took this lady behind the meat counter and washed the cut off and bandaged it. I put Merthiolate on it.

229 Q. You put Kleenex on it? A. No, a Band-Aid.

Q. Prior to that did you put Kleenex on it? A. Yes, sir.

Q. How large a bandage did you put on it? A. Two inches.

Q. Is there a reason for a second Band-Aid? A. The first one the blood was coming through.

MR. FEISSNER: That is all I have.

CROSS EXAMINATION

BY MR. ROBERSON:

Q.. Can you describe for us, Mr. Miller, the appearance of this mark on her arm? What it looked like? A. It was just an ordinary break in the skin. About a half inch to an inch long.

Q. Would you describe it as a puncture or scratch type wound? A. Kind of a scratch.

Q. And it was bleeding? A. Yes, sir.

Q. After the second Band-Aid was put on did that stop the bleeding? A. Yes, sir.

THE COURT: I think we had better adjourn for the evening. If it is all right, members of the jury, we will meet at 9:30 tomorrow
230 morning again.

(Whereupon, at 4:20 p.m., the hearing adjourned to reconvene at 9:30 the following morning.)

Washington, D.C.
November 16, 1967

233 PROCEEDINGS

THE COURT: Good morning, ladies and gentlemen. Are we prepared to proceed, gentlemen?

MR. FEISSNER: At this time, I would like to read into evidence the deposition of the Safeway manager in Roanoke.

(Whereupon, the deposition of Mr. Gilbert Perkey was read into evidence.)

THE COURT: Ladies and gentlemen of the jury, I am going to excuse you while we confer outside of your presence.

(Whereupon, the jury retired from the hearing room.)

MR. ROBERSON: Your honor, please, in the Safeway case, No. 1776-64, I make a motion for a directed verdict in favor of the defendant on two grounds:

The first is the matter of no constructive notice. No actual notice has been established. The second is that there has been a failure of proof with respect to the causation between the scratch and the death. The lawsuit is one for wrongful death and, although there may have been a scratch there which the jury could find was negligence, that wouldn't entitle her to a verdict in this case.

It is a wrongful death action and it is essential to convince the jury the scratch was the cause of death. The pre-trial order sets out

234 the only respects in which they allege the Safeway store was negligent. They are: (1) the failure to inspect equipment, namely, the shopping cart, and (2) failure to remove said cart from the area where it would be used by customers.

I think, your honor, that the evidence does not establish a failure to inspect the equipment or failure to remove it when we had actual or constructive notice. We didn't have actual notice. At least, there is no evidence we did.

There is no evidence that we had constructive notice and the only evidence is that we did not. There is no evidence that we should have inspected these carts for free.

There is no evidence that this particular defect was there for one day, two days, five days or five minutes. There is complete absence of evidence the jury could find without speculation.

Enough time had elapsed since this thing occurred. If they had reasonably inspected these carts, then they could have discovered it and repaired or removed it. I say there is complete failure of proof in that connection.

The only evidence is from Mr. Perkey, the manager, to the effect that these carts are routinely inspected. That is the practice of the store of which he is the manager and it is a direction from above. It is
235 done once a month for cleanliness and defects.

He estimated the last previous inspection was about two weeks before this accident. I think it would be unreasonable to say that we had to have a man inspect these carts all the time, routinely; in view of all the evidence in the case, that in his 19 years of experience there have been only two or three incidents of this.

No reasonable man as a juror could say, "Well, you should have inspected it more recently than the two weeks previously." I think that apart from the medical issue there is a failure of proof here and it should not be allowed to go to the jury.

Secondly, it is perfectly obvious that there has been a failure of proof on the causal relationship. This is not a matter which the jury can rely on from their lay opinion or their hunches. They must rely on the medical evidence in this case.

* * * * * *

236 MR. FEISSNER: Answering to the contention of notice, if your honor please, as set forth in the instruction that we have tendered, the contention is one of constructive notice that a storekeeper owes to the business invitee and it is his duty in the district that as a storekeeper he is to use reasonable care to make the premises safe.

* * * * * *

238 This is constructive notice. We submit that these cases clearly stand for the proposition, as does the cited instruction submitted to the court, that it is the duty of the shop owner to make the premises safe and whether he has discharged that duty by inspecting something utilized by the people every time they come in the store by inspecting it 14 days past, is a question for a jury to decide -- whether or not he has had an opportunity to discover this defect as being a defect in a cart that is given to the customer to use.

In other words, by his giving the customer the cart to use, it is his duty to make that cart reasonably safe and it is our contention -- and we think it is reasonably clear under the cases cited - that a 14-day period of time is an exceptionally substantial period of time for a shop-keeper to have constructive notice of the defect within his premises.

239 Addressing ourselves to the second issue. The evidence, as I recall it from the medical witness, was in three parts and on three occasions stated clearly and affirmatively in his opinion -- expressing that opinion with reasonable medical certainty -- what the cause of the death was.

First of all, there is the proposition of law that one whose negligence causes an injury to another, that he is responsible for any negligent treatment that person receives as a matter of law. It is a foreseeable factor.

This is partially set forth in the prayer by defendant Safeway in Prayer No. 2 and is sustained by Prosser, Harper and James at page 1124.

It is that a wrongdoer injures a person and the person thereafter receives negligent treatment by the physician, the original wrongdoer is responsible for that treatment.

* * * * * *

241 In the case at bar, to contrast these cases, we have testimony on behalf of the plaintiff, which your honor, of course, is considering in a light most favorable to the plaintiff in which the testimony is not that

it was possible to have two causes, but that there was only one cause, and the treatment she received caused and contributed to her demise and aggravated her demise.

I think the testimony of the physician is entitled to much greater weight than that of the witness, since the evidence was that either the underlying disease or the medication was the cause. But, in our case we do not have the two possibilities.

THE COURT: What do you mean by that? You don't have two possibilities.

MR. FEISSNER: We do not have two possibilities in the testimony on behalf of the plaintiff at this point. The testimony on behalf of
242 the plaintiff is that the medical treatment was the cause.

THE COURT: I don't think there is any testimony to that effect. I think the testimony was that her death was caused by this cardiovascular incident and I don't recall any testimony at all that it was caused by the injury to her arm.

MR. FEISSNER: I am referring to the three portions of the testimony that I read. The physician stated that the failure to apply treatment measures which he felt were reasonable and proper in this community would have enhanced her likelihood of recovering, in one situation, and in the second, greatly enhance her likelihood of recovering and shorten the course of her disability. Third, it was an aggravating factor in her demise.

THE COURT: That is as close as you come to it? An aggravating factor in her demise? Whether or not it is a direct and proximate result of the injury to her arm?

I might add at this point that I made a suggestion to you and gave you an opportunity to pursue the question of the cause of death directly by the doctor and you did not do that. You elected to ask him the hypothetical question which reflected upon the standard of treatment of the district.

MR. FEISSNER: Just prior to the testimony the doctor was
243 starting to explain, 'I was trying to determine if there was a reasonable relationship or any relationship here between the stroke and the cause of death." He sated, "My reasoning was this way ---" and at that point there was an objection and the objection was sustained.

THE COURT: Because he wasn't expressing an opinion at all. He was just talking about his state of mind. He was starting to say, and had in fact said whether there was a relationship between these and he stated that the exact cause of what we call a cerebral accident cannot be pinpointed. "The exact cause of what we call a cerebral vascular accident cannot be pinpointed." Had he been asked whether or not he had an opinion as to the cause of death then he could have answered it.

MR. FEISSNER: In the question he was asked to express an opinion, what the relationship was between her death and the injury she received with the subsequent treatment and was starting to explain what the relationship was between her death -- the point I am trying to make, if your honor will allow me, is that the testimony of the physician, the treatment and her failure to receive treatment was an aggravating factor with her demise in accordance with the case we have and we feel it is on the question of proximate cause.

* * * * * *

245 The physician has all the advantage. What may be slight evidence where there is no such advantage as in ordinary negligence cases, takes on greater weight in malpractice suits. Generally speaking, direct and positive testimony to specific acts is not required. In many cases, then, it goes into the philosophy.

THE COURT: Now we are talking about Safeway. We are not talking about malpractice.

MR. FEISSNER: I am relating, sir, the second aspect of Safeway's contention. Safeway's first contention. The second contention is that there was no relationship, but the law, as we understand it, is that Safeway is responsible for the malpractice of the physician who

thereafter treats the individual who is hurt in the store, unless it is an extraordinary or highly unusual result.

It is foreseeable as a matter of law that there could be negligent treatment. The prayers which were submitted, except for the last sentence in Safeway's prayer, is accurate in that respect, that the defendant Safeway would be liable for the acts of the doctor because it is a foreseeable consequence in addition with the other authorities I cite. The question we see revolves to the testimony we have had as to whether there was an aggravating factor to her illness and the testimony of the plaintiff, giving
246 it the benefit of all inferences at this point, is that it was an aggravated treatment and was an aggravating factor in her demise and since the treatment she received that was referred to by the physician was the number of treatments as the result of the injury at the Safeway store, it follows that the Safeway store is in the case.

Besides Goodwin vs. Hertzberg, there is one other case. This, again, was a situation where the trial judge had granted a directed verdict in a malpractice action and was reversed.

This was a case where the plaintiff's only offer of any evidence as to malpractice was a question of usual prognosis. The injury was such that it normally heals and everything is fine. The Court of Appeals held -- citing the cases I have just brought to your honor's attention, including the case that the court should consider -- they said it was a question of fact, that it was a significant matter and should have healed normally and is a proper subject to be considered by the jury.

They reversed a directed verdict in that case. Citing these other authorities I brought to your honor's attention, I will close at this point.

The point that is involved here is perhaps one difficult for many
247 people to grasp, but at this juncture we respectfully suggest your honor is not looking at the evidence of both sides. We respectfully suggest that your honor is on my shoulder looking at the evidence in my file.

THE COURT: I believe I understand that principle.

* * * * * *

248 MR. ROBERSON: Your honor, directing yourself to the cases he mentioned on notice. First, they are ice cases where the ice was melting in front of them and one was the stairway case where the defect had existed for three days. The last time some lady trundled this cart home that morning.

It is indistinguishable, it seems to me, from the ordinary debris cases. If he had any evidence that this thing had existed for two days, three days or fourteen days, that someone had seen it before, then there would be a question to go the jury as to whether inspecting once a month or, in this case, before Dr. Hantsoo -- in the absence of that, there is no basis for the jury to find that this thing of the wire having broken loose that morning or the previous day.

So, he has no evidence on the notice proposition. On the second proposition that there is a failure to relate this scratch to the death and there isn't any doubt that she died of a CVA and any evidence that the scratch had caused her death.

All the medical evidence to the contrary. Dr. Chapman was a good deal stronger in his deposition than he was at the trial, and he wasn't asked at the trial whether the scratch was the prime cause of the death.

249 THE COURT: As far as the notice problem is concerned, the possibilities of how that wire got loose are many and varied. Even while the decedent herself was pushing the basket she might have run it against a sharp corner of a table or something and caused the wire to come out.

I am not familiar with the District cases, aside from two that you gave me, Mr. Roberson. It puts the court at a great handicap to have counsel read excerpts from a library to him without an opportunity to check those in advance.

But, in the other cases you have cited, Mr. Feissner, there is a time when it can be determined that this condition began to exist and as soon as you have that then, of course, the question arises as to whether or not there is any reasonable opportunity for this to come to the attention of the store owner.

As far as the stairway goes, I haven't read the case but I assume that it was the stairway the manager might use as much as the customer and therefore it should become obvious to him.

He had an opportunity, in the case where there was ice on the floor. I recognize the great handicap you have in that you don't have the party who suffered the injury here to testify as to exactly what happened, but I don't think that as far as time goes, any of the other cases you have
250 cited have any relationship at all to this.

Take the classic, the case of the mouse and the bottle of Coca-Cola and you know the mouse was in before they put the cap on the Coca-Cola bottle and the Coke was probably put in on top of him and then capped.

At this point, of course, the possibility of this happening, the company ought to know about so, of course, they would be responsible for it. They had an opportunity to inspect it but in this case there just isn't any evidence at all on that part of it.

I don't know what the law is in light of that fact. Have you anything that would reflect on that?

MR. FEISSNER: Your honor, the cases I brought to your attention where the evidence is permissible of the inference, if they had at least a 14-day period. Not longer ---

THE COURT: There isn't any such inference to draw from the testimony.

MR. FEISSNER: The testimony is that it was last inspected 14 days prior.

THE COURT: I know, but there is no time when you put down when this condition began to exist. There is no way of our knowing that.

MR. FEISSNER: The only person who would know would be
251 the defendant. The fact remains that it is something used daily and he didn't inspect it. It is something or what is used in the store, such as steps or walking in the aisle.

The same thing applies to the grocery cart; that it too is used. I think the management would have as equal an opportunity to observe and to make the premises safe.

THE COURT: If you want to make your motion, Mr. Welch.

MR. WELCH: If the court please, on behalf of the defendant, Dr. Leonhard Hantsoo, 1777-64, we move for a directed verdict and for the following reasons: to begin with, I refer you respectively to the complaint for damages in this case, paragraph 3 thereof, which states, "The plaintiff further avers and alleges that the said defendant upon casual examination of decedent's injured forearm applied and/or injected antibiotic shots carelessly and negligently without first ascertaining whether decedent was allergic to it and as a result decedent's forearm became swollen.":

In the matter of what they have put in their pre-trial order, the main thrust and foundation of their complaint is that negligently antibiotics were injected which caused the conditions complained of.

252 I submit respectfully that there is not one word of testimony in this case that any antibiotic was injected into this woman. On the contrary, when he put Dr. Hantsoo on the stand -- and while he may have intended to utilize Dr. Hantsoo as a hostile witness -- he did not so state nor did he ask that he be permitted to use the witness under the rule.

Therefore, I submit that he is not entitled to consider Dr. Hantsoo's testimony in any other light than his own witness and not as a hostile witness.

It is true that he is party, but if you intend to use him as a hostile witness you so announce it to the court and jury so that they are aware that he is being questioned in that regard.

That was not done here and I think we have the right to assume that his testimony is to be considered as any regular witness and he testified that he did not inject any antibiotics in this lady; therefore, the basic problem which they have to prove is out the window and almost of itself we would be entitled to a directed verdict on that ground.

But, to go further. Because of the questioning of Dr. Chapman and his attempts by devious use of language and by failure to give straightforward and direct answers and because he was not asked the $64 question, which is the whole basis of this case, namely, what was the cause of this
253 woman's death.

It is perfectly obvious, I think. It must be so that he did not dare ask him that because the good doctor, with his evasiveness and mannerisms, obviously told him, "If I am asked that question, I cannot medically give an answer by saying that Dr. Hantsoo caused her death, but I can by buildups on the theory that if she received a cut and hadn't somewhere in her history had frequent urination and upon which I could say she must have had diabetes -- if those questions are asked, I can say this thing may have been triggered off which, if this happened and that happened and something else didn't happen, then it was something.

"If she had done the way I said, which would enhance her likelihood of recovering," I submit that is too speculative to permit such a matter to go to a jury, particularly in the light of what Dr. Wagner said.

I didn't ask Dr. Wagner anything because he made a good witness for me and I long since found out that when he has made a good witness leave him alone, but Dr. Wagner, in response to questions by Mr. Feissner, told him that this woman's death came from hypertension and he explained what occurred in the blood vessels and in the brain and how it occurred. He said the scratch on her hand had nothing to do with it.
254 The inflammation in the arm which may have come from the tetanus toxoid had nothing to do with it at all. Where is the testimony from Dr. Chapman who is the only one they can rely on?

Where is the testimony from him that would permit a lay jury, who is unfamiliar with these things, and who must, from the progress of Dr. Chapman's testimony, be very much confused. But, we have something we can turn to in Dr. Chapman which is somewhat revealing and that is, if you will recall, because he had a deposition.

I made certain inquiries about what he had said on that deposition. That was at page 45. He was asked this question. "Isn't this a question of judgment, he being there and able to see the wound? Answer: Yes. I am trying to give you my judgment." And he demonstrated his judgment.

"Answer: You asked me for my impression." Obviously, the treatment of persons by medical doctors many, many times calls for judgment and unless that judgment is improperly used -- and there is no evidence that it was -- then the doctor cannot be held responsible even if the use of that judgment had caused some untoward happening.

This doctor didn't say that the treatment of this wound caused her death in any way whatsoever. As a matter of fact, he said, on page 47 -- and when I read it in review, although I was well aware that it was
255 there, marked it and almost made the mistake of reading my remark yesterday to him, I put "Well, well," because it pleased me no end when I recalled it.

He said, on page 46, in answer to this question, "Is there anything Dr. Hantsoo did that he shouldn't have done during the course of the treatment of this patient up to the admission to the hospital?"

I think that is the important time. If he failed to do something that caused her to have this stroke you might have a connection and he had to give testimony to that if he was going to connect it. He said again, "The record indicates what he did."

Now, if there are other things that he did, I can't pass on them because I don't know about them. That is a typical answer of Dr. Chapman. It has nothing to do with the answer he should have given.

Here is his answer following the voluntary statement. "I would say no on the basis of what I know now." Then later on he said, on page 47 -- the question was, "I am talking about what he did. The treatment of the wound, the bandaging, the giving of the tetanus shot.

"Answer: No, the things he indicated he did here are acceptable and within the usual medical standards, I would say.

Question: Do you find no objection with the administering of the tetanus
256 toxoid? Answer: No." These are direct statements of what Dr. Hantsoo did in accordance with acceptable medical standards including the giving of tetanus toxoid.

You heard him squirm out of it yesterday. The problem of tetanus toxoid and whether she had previously had tetanus toxoid, which could be very, very complicated in its application by a jury, because they might feel that such a statement on his part in some way connects this woman's unfortunate death with the original tetanus toxoid which he didn't say a word about having done anything here which caused this woman's death.

If the court please, I know you are familiar with the general law of these situations and I am not going to try to read a lot of law to you in that regard, but simply stated, in a malpractice action, the burden is on the plaintiff to establish that the defendant did not exercise "That degree of care and skill ordinarily exercised by the profession in his own or similar localities."

There are plenty of cases on it. Rogers vs. Lawson, 83 U.S. Appeals, D. C. 218. Quick vs. Thurston, 110 U.S. Appeals, D.C., 169. I have Fed. Second if you want it.

The first one is 83 U.S. Appeals, D.C., 281. That is 170 Fed. Second 157. The second is 290 Fed. Second 360. The general rule, of course, is that the testimony of witnesses skilled in medicine and
257 surgery is necessary to establish on departure from the required standard of professional care.

Caton vs. English, 57 Appeals, D.C., 324-25, Fed. Second 745. Young vs. Good, 73 Fed. Second 442 and the previous case of Rogers vs. Lawson.

Dr. Chapman didn't establish any tests and he wasn't asked what the tests were. All Dr. Chapman was asked was to say something that was in this picture that wasn't in accord with acceptable medical practice.

The only thing he said was what your honor referred to about the possibility -- I have forgotten the language -- that the series of events, so to speak, may have been a factor in bringing about this situation.

He never gave any medical connection. He never went so far as to say what caused her death. He wasn't asked. In addition to that, I think that the opinions expressed by this doctor, based upon hospital records and a certificate from the doctor which was a letter.

As you will recall, that was all the medical there was in there in addition to the doctor's office records. That means that this man is expressing an opinion upon an opinion. Of course, I referred to this earlier when I didn't think he ought to be permitted to testify. Having been permitted to testify, under the circumstances, it seems to me that
258 the Supreme Court case of Davis vs. Virginia Railroad, a 1960 case, 361 U. S. 354, would govern it.

The court in that case stated the testimony by an individual physician as to what a person would do, "And that is all this doctor's testimony amounts to." In fact, the answer he gave for having been asked the question he should have been asked -- in fact, he almost asked it and yet he didn't do it.

It seems to me that it is perfectly obvious why he didn't do it with such a willing witness as he had in his behalf. Under these circumstances, should this doctor be subjected to such flimsy testimony? To what a jury of inexperienced people in this type of thing might glean from what this doctor said?

It seems to me that what he would have done or what other things he would have done amount to no more than saying, 'I would do it in a different way," and that is not testimony upon which a person can be found guilty of malpractice because, as your honor knows, the cases in that regard hold that it didn't matter what another physician would have done.

The rule is what the doctor who is doing it did in accordance with the practice in the area in which he practices and in the community. There is no testimony to the contrary here and I submit it would be pure

259 speculation and it would be submitting this doctor to the unfortunate vagaries of a jury who can be swayed because a death has occurred in a situation.

If there was a living person who was here and who could be exhibited, that might be a different situation. But, to permit in a case of this kind this doctor to be subjected to the danger of having his reputation at stake in the situation, it seems to me is going too far afield, and I respectfully ask that a directed verdict be granted in behalf of Dr. Hantsoo or failure of proof because of the type of action.

* * * * * *

260 THE COURT: May I ask is the pre-trial order signed by an assistant pre-trial examiner sufficient to modify the complaint?

MR. WELCH: I think it is acceptable in the case, as part of the case, yes, sir.

261 THE COURT: So, we have Paragraph 3 that you have read modified. Now, on page 4 of the pre-trial order, starting in the middle of the page, "Gave decedent tetanus toxoid or antibiotics which caused a severe reaction."

In the first place, there is absolutely no evidence that any antibiotics were administered and I think that contention has been abandoned. At least there is no evidence to support it. This is by injection.

There may have been antibiotic salve applied to the wound. The tetanus toxoid injection, the only evidence we have with respect to that is that it does not cause an allergic reaction at all and it is not disputed.

Dr. Chapman, I believe, affirmatively testified that that was correct. As I understand what Dr. Chapman was trying to put over was that both the shot and the necessary --what it took the body to absorb the shot and to get over the reaction to it -- in other words, the sore arm, like we all get from a shot, and also to take care of the infection which was in the wound caused her body to work overtime, you might say, and therefore -- I have forgotten his exact words -- contributed.

But in the law on that, as counsel pointed out, Mr. Feissner pointed out, is that if a person already has an illness and is injured by negligence of a defendant, if that injury proximately causes the death because of the condition of the patient theretofore, then the defendant is liable, but,

262 as I understand, he is sticking now to the toxoid injection.

As I understood Dr. Chapman he agreed that when a person has a wound of this character that it is accepted medical practice to give some medication to prevent tetanus and that, I gather, would have given a tetanus antitoxin and that tetanus antitoxin does risk allergic reaction but it works rapidly to protect the person and then they take care of the allergy as best they can after they give that.

But, since there is no indication that tetanus is in any way responsible for the death then it would seem absolutely immaterial whether the type of tetanus administration -- that is, the administration of a drug to prevent tetanus from forming -- would be absolutely immaterial because whether it took three weeks to act or one week to act, if there was no tetanus germ there it could just as well have been omitted so that the form of medication for that purpose is immaterial too.

I don't see that the choice of tetanus toxoid, even if he would have given tetanus antitoxin, is anything to be criticized in view of the fact that it had no causal connection with the death and his complaint is not supported by this testimony in that no allergic reaction resulted.

263 Whether the complaint in that form must be strictly upheld, I don't know, but in any event I think that if you just assume that what the complaint says is that by reason of the doctor not taking care of the wound in the proper way and by reason of his having given tetanus antitoxin her death was caused.

If you read it that way, then you look to see whether or not the treatment which was given accords with the standards in this community.

Certainly I would conclude that there is no evidence that the giving of the tetanus toxoid shot did not comport with the standards. So, then we are left as to whether or not the treatment of the wound did not

accord with the standards and in that respect he said he would prefer to put on wet dressings to keep the wound warm and that, depending upon the severity of the inflammation and infection and the place where it is, and so forth, as I understand it that is acceptable treatment.

MR. WELCH: Yes, but it is also a matter of judgment as to whether, under the circumstances, it should be used and saying he would prefer it is not any act related to what is in accord with good practice.

MR. FEISSNER: The question, your honor, as was stated in the doctor's deposition, was read back and he stated it was the practice in the community, the accepted practice that after a period of 7 to 10 days

264 when a patient's wound doesn't heal in the interim period of time you do maintain moist dressings, when there is an infection.

THE COURT: I don't remember any evidence where he said what Dr. Hantsoo did wasn't accepted medical practice. In other words, he said it was accepted practice to put on wet dressings and we have to take his word on that. He didn't say it is not acceptable to do as Dr. Hantsoo.

MR. FEISSNER: He said "failure to apply additional treatment measures," when speaking of the doctor's deficiencies. "It is from this time on in her clinical career there were failures to apply additional treatment measures."

THE COURT: At what point was that? Off the record.

(Discussion off the record.)

THE COURT: The problem that I find, Mr. Feissner, is this: she died of a stroke. That is the way it appears. She had the stroke, the beginning of it prior to the time she came to the hospital. How these things caused the death -- in other words, caused the stroke is the problem.

MR. FEISSNER: Your honor, to comment on that: a great deal was made of the testimony by the doctor yesterday and is to the credit of the plaintiff because the doctor, yesterday, would not take into considera-

265 tion the fact that there was an infection.

THE COURT: I don't know that that is what he said. He said that the wound, all wounds are infected. That is, all cuts, if they are not made surgically, start out with some infection and the body, of course, fights that and an ordinary scratch would be taken care of normally.

All wounds get some infection and he read what was done about this and what treatment had been given and he took all this into consideration and testified that there was no connection between this wound and also, as far as that goes, the injection and the death ---

MR. FEISSNER: As I recall, did you take into consideration that she had an infection, that she was diabetic? To answer your honor's question, the doctor was speaking in response to a question whether the treatment afforded by Dr. Hantsoo to this patient in this community was in the accepted standards as existing between medical practitioners practicing medicine at a like time, recognizing that you are expressing your opinion within the framework of reasonable medical certainty?

"Answer: There are areas of the medical career of this patient when the treatment did not meet the acceptable standards for care of a condition of this sort. Question: What in your opinion was the effect on the patient of these deficiencies? Answer: The hypothetical case stated
266 that the patient felt weakness, dizziness, nausea and became feverish. This is documented in the memorandum and also from the statements in the hypothetical case.

"These, in my opinion, these symptoms are in fact systemic signs, therefore, my opinion is based on my feeling that these are indications of a systemic reaction or general body reaction to an infection occurring in this woman's right upper extremities.

"It is from this time on in her clinical career that there were, in my opinion, failures to apply additional measures which would have reduced this patient's current suffering and would have enhanced her likelihood of recovery.

"These measures would be, at the time I described, would be use of a warm, wet dressing, possibly the use of antibiotics of an appropriate nature by mouth or injection. It might include cultures of the

wound, taking a specimen of the drainage. At the time this patient developed the complications I described in the record and the hypothetical question and the general systemic reaction, further tests should have been done.

"These are the application of a warm, moist dressing to the infected area, the use of appropriate antibiotics after determination of the type germ or organism which is infecting the wound. I think it could be done
267 by taking a culture of the wound. In addition, if the patient did not respond, hospitalization or more intensive care than can be provided in the home should have been instituted."

THE COURT: There is another difficulty that bothers me and I don't know what the effect of it is, but I think I may as well point it out, and that is in asking your hypothetical question you described the wound as a puncture wound.

If it isn't a puncture wound and if it is a scratch and if it goes to the jury, we ought to ask for special interrogatory. If it is a scratch, you don't have any evidence at all to support ---

MR. FEISSNER: You raised that question when we asked it the first time.

THE COURT: I pointed out to you, without raising this direct thing -- I think we had a jury present at the time when you were asking a hypothetical question, which is the only way you can do it when it comes to the treatment the doctor gave and whether or not it is up to acceptable standards, you have to specify in your hypothetical question what the conditions were that he was treating and there is some testimony that it is a puncture wound and some that it is a scratch.

268 MR. FEISSNER: I think the type of wound was delineated.

THE COURT: Read the question.

MR. FEISSNER: A 64-year old woman with a history of high blood pressure, daily routine of house work, baby sitting, shopping and cooking; and further assuming on July 1, 1963 she incurred a wound of approximately three centimeters in her arm from a piece of open or broken wire on a cart in a Safeway store. "Answer: She was treated with debridement and she received pills for high blood pressure."

THE COURT: Is there anything more, gentlemen, on this subject?

MR. WELCH: Only one thing. He referred to her -- Dr. Chapman having said she had systemic signs. You will recall that there is nothing in the hospital record about any systemic signs and that is borne out by Dr. Wagner who said the temperature rise she had at the time she had it indicated nothing with regard to systemic signs; that it wasn't that kind of a temperature and when he went into the hospital she had a normal temperature which indicated that she had no systemic condition, which would be almost utterly confusing to the jury.

THE COURT: I am very reluctant to take a case away from a jury and I only would do it in this case because of the confusion existing in the evidence. The problem I am having is on the question of the cause
269 of death and I think that you have to come to the conclusion in order to sustain the plaintiff's case that the wound received in the Safeway store and the subsequent treatment by the doctor was the proximate cause of the plaintiff's death.

There is no question but that the record shows that the patient's temperature was normal when she came to the hospital and that she had already had a stroke. That would indicate that the infection wasn't bothering then. The question in my mind is whether or not that would indicate that it was all over with, that all the infection was over. I don't know. I will give this some consideration.

* * * * *

Civil Action No. 1776-64
November 17, 1967

* * *

[Filed November 17, 1967]

ORDER

Defendant SAFEWAY STORES, INC., having moved at the conclusion of all the evidence herein for a directed verdict in its favor, it is by the Court, this day of November, 1967,

ORDERED, that the motion be, and hereby is granted, and that plaintiff take nothing herein; and it is further ordered that defendant SAFEWAY STORES, INC., have judgment against plaintiff for costs, for which let execution issue.

/s/ _____
Judge

[Certificate of Service]

[Filed November 17, 1967]

ORDER FOR DIRECTED VERDICT

Defendant, Dr. Leonard J. Hantsoo having moved, at the conclusion of all the evidence herein for a directed verdict in his favor, it is by the Court this day of November, 1967,

ORDERED, that the motion be and the same is hereby granted and plaintiff take nothing herein; and, it is further,

ORDERED, that defendant Dr. Leonard J. Hantsoo have judgment against plaintiff, Betty Ann Zimmerman, for costs for which let execution issue.

/s/ _____
Judge Albert Stephens

[Certificate of Service]

[Filed November 27, 1967]

NOTICE OF APPEAL

Notice is hereby given this 27th day of November, 1967, that BETTY ANN ZIMMERMAN, Administratrix of the Estate of Bessie Lee Junes, Deceased, Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of November, 1967 in favor of the Defendant, SAFEWAY STORES, INC. against said BETTY ANN ZIMMERMAN, Administratrix of the Estate of Bessie Lee Junes, Deceased, Plaintiff.

/s/ Karl G. Feissner
Attorney for Plaintiff
6401 New Hampshire Ave.
Hyattsville, Maryland
270-2626

[Certificate of Service]

[Filed November 27, 1967]

* * *

BETTY ANN ZIMMERMAN, Administratrix of the Estate of Bessie Lee Junes, Deceased,
Plaintiff,
vs.
DR. LEONARD J. HANTSOO,
Defendant.
: Civil Action No. 1777-64

NOTICE OF APPEAL

Notice is hereby given this 27th day of November, 1967, that BETTY ANN ZIMMERMAN, Administratrix of the Estate of Bessie Lee Junes, Deceased, Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of November, 1967 in favor of the Defendant, DR. LEONARD

J. HANTSOO against said BETTY ANN ZIMMERMAN, Administratrix of the Estate of Bessie Lee Junes, Deceased, Plaintiff.

/s/ Karl G. Feissner
Attorney for Plaintiff
6401 New Hampshire Ave.
Hyattsville, Maryland
270-2626

[Certificate of Service]

APPELLANT'S BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,556

BETTY ANN ZIMMERMAN,
Administratrix of the Estate of
Bessie Lee Junes,
Appellant,

v.

SAFEWAY STORES, INC.
Appellee.

Appeal From the United States District Court
of the District of Columbia

KARL G. FEISSNER
WILLIAM L. KAPLAN
THOMAS P. SMITH
6401 New Hampshire Avenue
Hyattsville, Maryland
270-2626

Attorneys for Appellant

STATEMENT OF QUESTIONS PRESENTED

1. Did the Lower Court err in directing a verdict for the Defendant in that the Plaintiff had failed to prove Defendant's prior actual or constructive notice of the defect in its shopping cart?

2. Did the Lower Court err in directing a verdict for the Defendant when the evidence conclusively showed that the Defendant failed to inspect its shopping carts for defects more than once a month and this inspection was cursory and incidental to cleaning the shopping cart?

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TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,556

BETTY ANN ZIMMERMAN,
Administratrix of the Estate of
Bessie Lee Junes,
Appellant,

v.

SAFEWAY STORES, INC.
Appellee.

Appeal From the United States District Court
of the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based upon the Act of October 31, 1951, 65 Stat. 726, as amended, 28 U.S. Code, Sec. 1291.

STATEMENT OF THE CASE

On July 1, 1963, Plaintiff's Decedent, Bessie Lee Junes, was a business invitee in one of the supermarkets owned by the Defendant, Safeway. While shopping in said store, Decedent was using a shopping cart provided by the Defendant for the use of its customers. As Decedent placed one of her purchases in the cart, a piece of heavy gauge steel wire that had broken loose from the inside basket portion of the cart, stabbed her, inflicting a puncture type wound in Decedent's right arm. (J.A. 36-41, 47-50, 55-58)

Defendant's employees attempted to stem the flow of blood coming from Decedent's right arm and applied several bandages to the injured area. (J.A. 17-21, 124-125)

Following the injury Decedent went to the medical offices of Defendant, Leonard J. Hantsoo, M.D., Appellee in companion Appeal No. 21,557, for continued treatment of her injury. (J.A. 61-62) After several days Decedent was confined to her bed as a result of complications resulting from her injury. (J.A. 36-41, 47-50, 55-58) Defendant Hantsoo tended Decedent for the next several weeks, but as a result of the aggravation of Decedent's prior existing hypertensive condition, both by the initial wound and the subsequent medical malpractice, Decedent died on July 24, 1963. (J.A. 16, 62)

On July 24, 1964, Plaintiff, as Administratrix of the estate of Bessie Lee Junes, deceased (J.A. 15) filed separate suits for wrongful death against both Defendants. (J.A. 2-6)

Upon trial of these consolidated cases, Plaintiff proved that the subject shopping carts were cleaned only once every month and then, if any defects were noticed, the carts were repaired or removed. (J.A. 17-21, 124-125) There was no evidence that

the carts were specifically inspected for defects but only that as incidental to cleaning any defective carts were repaired or removed from general circulation. (J.A. 17-21, 124-125)

After the close of the testimony, Defendant Safeway made a Motion for Directed Verdict, (J.A. 126-133) on the basis of the fact that Plaintiff had not shown this Defendant's actual or constructive notice of the defect. (J.A. 126-133)

Plaintiff opposed this Motion (J.A. 126-133) but on November 17, 1967, the Court entered an Order granting the Motion. (J.A. 145) Plaintiff duly noted an Appeal to this Court on November 17, 1967 from this ruling and Order. (J.A. 146).

STATEMENT OF POINTS

1. Once the Plaintiff, as a business invitee, shows that a defective condition existed in a shopping cart provided for her use, it is not necessary to show the actual length of time that the defect was in existence or that the Defendant had actual or constructive notice of the defect.

2. Failure to properly inspect a shopping cart provided for business invitees constitutes negligence in and of itself.

SUMMARY OF ARGUMENT

1. Plaintiff's evidence that a defective condition existed in a shopping cart provided for business invitees of the Defendant established a prima facie case of negligence and the fact that Plaintiff is in no position to affirmatively prove the length of time the defect was in existence does not defeat her right to have the case submitted to the jury.

2. A cursory inspection of shopping carts once a month incidental to cleaning dirt and debris from the carts is sufficient to establish a prima facie case of negligence brought by an injured business invitee.

ARGUMENT

I.

THE LOWER COURT ERRED IN RULING THAT ACTUAL OR CONSTRUCTIVE NOTICE OF A DEADLY DEFECT IN A SHOPPING CART IS NECESSARY TO CONSTITUTE A PRIMA FACIE CASE OF NEGLIGENCE.

Evidence presented at trial, both by the use of an absent witness' Deposition and by the trial testimony of witness Miller showed that on July 1, 1963 the Decedent was a business invitee in Defendant Safeway's store, and that she was using a shopping cart provided by the Defendant for the use of its customers. The evidence further showed that as Decedent placed one of her purchases in the bottom of the cart, a broken loose heavy gauge steel wire that protruded 4-5 inches from the basket, stabbed her right forearm. (J.A. 17-21, 124-125) While the Defendant's employees administered rudimentary first aid to Decedent's injury, several bandages could not effectively stem the bleeding. (J.A. 17-21, 124-125)

Witness Perkey, the manager at this particular store, testified that shopping carts were cleaned of dirt and debris once a month and that if any defects were noticed as a result of the cleaning then the defective cart was either repaired or removed from store circulation. (J.A. 17-21) Plaintiff, of course, was in no position to prove exactly when the steel wire was first broken, only that there was a fatally defective

condition existing in the cart provided by the Defendant for Decedent's use and that Decedent was injured while using the cart for the purpose for which it was intended.

It can be unquestioned that as a business invitee, Defendant Safeway owed the Decedent a duty to exercise ordinary care for her safety, and likewise owed the Decedent the duty of inspection. *Hellyer v. Sears Roebuck and Company*, 62 App. D.C. 318, 67 F.2d 584 (1933). The trial court was of the opinion that both the original duty and the continuing duty of inspection involved the necessity of notice, and directed a verdict for the Defendant on this ground. (J.A. 126-133) The question of the frequency of inspection is considered in Argument II, *infra*, but it is respectfully submitted that the learned trial court was in fact in gross and detrimental error in ruling that proof of actual or constructive notice necessarily formed a part of the Plaintiff's case.

Case law in the District of Columbia that has examined the point in question has not in fact held that prior notice is a necessary element of the Plaintiff's case in negligence. Thus, in *Hellyer, supra*, the Court ruled that a business invitee who tripped on "the metal nosing" on some steps in the Defendant's store did not in fact have to prove exactly how long the defect had been in existence, but that upon proving that the "nosing" extended above the steps, as cause of actionable negligence arose for an injury to a business invitee.

The court went on to state that once the Plaintiff had proved the fact of the "extension", the burden shifted to the Defendant to show that the steps were properly constructed and/or thereafter properly maintained.

This principle was earlier recognized in the case of *Market Co. v. Clagett*, 19 App. D.C. 12 (1901), wherein an action was instituted for the Plaintiff's injuries received as a result of a slip on a pile of fish. Though there was some evidence as

to the probable time the fish fell onto the floor, the Court specifically ruled that the Plaintiff's right to recover did not in fact depend upon the Defendant's notice of the defect and stated:

> ". . . having the means of knowledge, and negligently remaining ignorant is equivalent, in creating a liability, to actual knowledge." at page 26.

In the recent case of *Wollerman v. Grand Union Stores, Inc.* 47 N.J. 426, 221 A.2d 513 (1966) the New Jersey Court had an opportunity to examine an analogous and persuasive case. In *Wollerman*, a personal injury action was instituted as a result of a stray string bean on the floor of the market. There was no evidence as to the length of time the bean had remained on the floor or as to precisely how the bean came to rest on the floor.

While the Court noted the many possible reasons that could be advanced as to both the time and manner the bean came to rest, it rules that once the Plaintiff had established the bean's presence it was then necessary for the Defendant to come forward with proof of measures it had taken to provide for just such an eventuality. The Court further placed great stress upon the fact that a store choosing to conduct business in a certain manner, "must do what is reasonably necessary to protect the customer from the risk of injury the mode of operation is likely to generate." The Court also noted that the customer-Plaintiff would hardly be in a position to know the precise point of neglect, and that the "probability" of neglect was sufficient to require the Defendant to come forth with evidence of the care he employed.

Though many of the cited cases have been slip-fall cases resulting from refuse on the floor, it is submitted that a fatally defective shopping cart should have no different principles applied. See *Maugeri v. Great Atlantic and Pacific Tea Company, Inc.*,

357 F.2d 202 (10th Cir. 1966), *Brady v. Great Atlantic and Pacific Tea Company*, 336 Mass. 386, 145 N.E. 2d 828 (1957) and *O'Rourke v. Marshall Field & Co.*, 307 Ill. 197, 138 N.E. 2d 625 (1923).

Applying the above cited principles to the instant facts, it is submitted that Plaintiff's inability to prove the precise point in time that the fatal defect occurred is, in fact, of no consequence.

Defendant has chosen to conduct its business by using shopping carts and has added the inherent risk and commensurate duty, with respect to these carts. While there is no evidence as to when or how the broken wire occurred, it is submitted that there was presented a "probability of neglect" that required the Defendant to come forward with evidence of the care employed to avoid this injury, and the jury to make the final determination.

II.

THE LOWER COURT ERRED IN RULING THAT AN INSPECTION OF THE SUBJECT SHOPPING CART ONLY ONCE EVERY MONTH WAS NOT NEGLIGENCE AS A MATTER OF LAW

The evidence presented showed that the shopping carts in this Safeway Store were cleaned once every month to remove dirt and debris from them, and that if any defects were *observed,* the defective cart was repaired or removed. (J.A. 17-21) The trial Court necessarily rules as a matter of law that this infrequent collateral inspection was not negligence.(J.A. 126-133)

While the question of frequency of inspection in a business premises is closely allied with the question of notice, the two are not in fact identical. As was stated

in *Hellyer, supra,* there exists a duty of inspection from time to time to keep the premises opened to the public under safe repair. In *District of Columbia v. Richards,* 75 App. D.C. 349, 128 F.2d 297 (1942), a slip-fall case resulting from water backed up by a clogged drain and/or small pieces of ice that had fallen on the grounds outside an open air market stall, the Court found that the Defendant had failed to properly clean the area on the day in question, and it was upon this failure to maintain the premises in a safe condtion that resulted in liability.

Finally, in *Market Co. v. Clagett, supra,* the entire issue of liability was predicated upon a failure of the Defendant "to provide a sufficient patrol and keep the aisles and corridors of the building clear and in a safe condition. And upon that supposition, the question of notice would, in any aspect of the case, become quite immaterial." at page 27.

In the instant case, the evidence clearly showed that the Defendant only collaterally inspected the shopping carts once every month, and then only as an incident to keeping them clean. (J.A. 17-21) In view of the fact that the Defendant provided the cart for the exact purposes for which Decedent was using the same, and thereby increased the likelihood of injury to the Decedent, the issue of the frequency of inspection, without regard to notice, provided a clear question that could only be resolved by the jury, and Plaintiff was erroneously deprived of this opportunity by the trial Court's erroneous misconception of the applicable legal principles.

CONCLUSION

Viewing the evidence most favorably to the Appellant, and acknowledging the fact that medical malpractice has consistently been ruled to be a forseeable consequence of a negligent act, it is respectfully submitted that Defendant's Motion for Directed Verdict was improperly granted and Appellant prays this Court reverse and remand this case for a new trial.

Respectfully submitted,

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Attorneys for Appellant

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,556

BETTY ANN ZIMMERMAN, Administratrix
of the Estate of Bessie Lee Junes, Deceased,
Appellant,

v.

SAFEWAY STORES, INC.,
Appellee.

Appeal from the United States District Court for the District of Columbia

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QUESTION PRESENTED

Whether the trial court, in granting a directed verdict for the appellee, properly determined that there was no evidence of probative value upon which the jury could reasonably have found that the appellee created or had knowledge of the condition complained of by the appellant.

TABLE OF CASES

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,556

BETTY ANN ZIMMERMAN, Administratrix
of the Estate of Bessie Lee Junes, Deceased,
Appellant,

v.

SAFEWAY STORES, INC.,
Appellee.

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

RESTATEMENT OF THE CASE

On or about July 1, 1963, the appellant's decedent, Bessie Lee Junes, entered the defendant's food store located at 12 7th Street, N.E., to purchase groceries [JA 47]. Sometime later she approached the store's manager, Mr. Gilbert Perkey, at the checkout counter [JA 18]. She told him that she scratched her arm on a loose wire while she was placing a pound of hotdogs into a bascart [JA 21]. She also stated that the incident could have been avoided and that it was "her fault for not noticing the wire." [Supp. A. 1-2].

Mr. Perkey inspected the bascart and noticed a loose wire approximately 4 or 5 inches below the handle [JA 19]. The wire protruded about an inch from the bascart's side [JA 48]. Mr. Perkey then took the decedent to a Mr. Miller in the meat department. Mr. Miller observed that Mrs. Junes had sustained a half inch to an inch scratch on her arm [JA 125]. He cleansed the scratch, applied Merthiolate and fastened two Band-Aids over it [JA 124]. The bleeding stopped after the second Band-Aid was applied [JA 125].

Mrs. Junes left the store immediately following the first aid treatment. She was met outside the store by her sister, Mrs. Margaret Idian, who saw the Band-Aid and was told of what occurred [JA 47]. Mrs. Idian entered the store and inspected the bascart [JA 48]. She observed a loose wire protruding about one inch from its side [JA 48]. She and Mrs. Junes then returned to the decedent's home [JA 51].

On July 2, 1963, the decedent was examined by Dr. Leonard Hantsoo [JA 24]. His examination revealed that the decedent has sustained a scratch some three centimeters in length on her right forearm [JA 16]. Dr. Hantsoo debrided the wound, applied an antibiotic ointment and gave the decedent a tetanus toxoid injection [JA 16, 25]. The scratch was covered with a bandage and the patient was advised to return for follow-up care [JA 25].

It was Safeway's policy and Mr. Perkey's practice to inspect the bascarts every month for cleanliness, breakage and damage [JA 19, 21]. The bascart causing the scratch on the decedent's arm had been inspected approximately two weeks before the incident [JA 19]. During the 19 years Mr. Perkey had been employed by Safeway, there were only two or three occasions when he discovered loose bascart wires during his inspection [JA 21].

There was no evidence presented at the trial of the condition of the bascart, how the wire became loose, how

long it had been loose or that the appellee's employees had an opportunity to repair it. The record contains no testimony from any of the witnesses that the appellee caused the wire to become loose or that appellee had actual or constructive notice that it had come loose.

SUMMARY OF ARGUMENT

The appellee is not an insurer of the safety of its customers and the law presumes that it was exercising reasonable care to keep the store in a safe condition for their use. The mere happening of the accident does not shift to the appellee the burden of establishing that the decedent's injury did not occur through its negligence. The burden is upon the appellant to establish that the appellant's decedent's injury was caused through the negligence of appellee's employees or that it had actual or constructive notice of the loose wire and failed to take reasonable measures to prevent the decedent's injury.

The trial court, therefore, correctly held that in order for the appellant to establish a *prima facie* case of negligence it was incumbent upon her to show that the appellee or its agents caused the wire on the bascart to come loose, had actual knowledge of the condition or permitted it to exist for a substantial period of time thus justifying a holding of constructive notice. The appellant presented no evidence of how the wire became loose, when it became loose or testimony relating to the condition of the cart which would indicate that it was in a state of disrepair. Quite possibly the wire became loose during the decedent's use of the bascart and before appellee's employees had an opportunity to discover the condition and repair it. And in view of the absence of evidence that the appellee either created or had knowledge of the loose wire, the trial court properly concluded that the appellant had failed to establish a case of negligence as a matter of law.

ARGUMENT

I. NO QUESTION OF FACT IS PRESENTED FOR JURY CONSIDERATION UNLESS THERE IS EVIDENCE THAT THE APPELLEE EITHER CREATED OR HAD KNOWLEDGE OF THE ALLEGED DEFECT.

A. There is no evidence in the record of how the alleged defect arose, the period of time during which it existed or that the appellee either created the defect or had knowledge of it.

A storekeeper is not an insurer of the safety of his customers. He is, however, under a duty to exercise reasonable care to keep the store in a safe condition for their use. *Foy* v. *Friedman*, 108 U.S.App.D.C. 176, 280 F.2d 724 (1960); *Brodsky* v. *Safeway Stores, Inc.*, 80 U.S.App. D.C. 301, 152 F.2d 677 (1945); *F. W. Woolworth Company* v. *Williams*, 59 App.D.C. 347, 41 F.2d 970 (1930). See generally PROSSER, TORTS (HORNBOOK SERIES) § 61 (3rd ed. 1964).

The scope of the storekeeper's duty has been clearly defined by this Court. It has repeatedly held that in order for a case to go to the jury to consider the question of his negligence in creating or permitting an unsafe condition to exist there must be evidence that the storekeeper or his employees created the condition, had actual knowledge of the condition or permitted it to exist for a substantial period of time thus justifying a holding of constructive notice. *Kelly* v. *Great Atlantic and Pacific Tea Co.*, 109 U.S.App.D.C. 181, 284 F.2d 610 (1960); *Brodsky* v. *Safeway Stores, Inc.*, *supra*.

The record in this action is completely devoid of any evidence that appellee or its agents were responsible for loosening the wire or that it knew, or in the exercise of reasonable care, should have known of the condition in

time to take action to guard against injury. There was no evidence that the condition existed at the time the plaintiff's decedent selected the bascart for her use in the store. There was likewise no evidence of how the wire became loose, when it became loose, or circumstances relating to the overall condition of the cart which would allow the jury to infer that the condition existed for a substantial period of time. And in light of the paucity of such evidence, it may well be that the condition arose during the decedent's use of the bascart and before appellee's employees had an opportunity to discover it and remove the bascart from service.

In those instances where the plaintiff has failed to present evidence of negligence on the appellee's part either in creating the alleged condition or in permitting it to continue, this Court has held that it was proper for the trial judge to direct a verdict in favor of the storekeeper. *Kelly* v. *Great Atlantic and Pacific Tea Co., supra; Brodsky* v. *Safeway Stores, Inc., supra.* cf. *Donnel* v. *Managers, Inc.*, 109 U.S.App.D.C. 370, 288 F.2d 154 (1961); *Martin* v. *United States*, 96 U.S.App.D.C. 294, 225 F.2d 945 (1955).

The appellant admits that there is no evidence in the record from which the jury could infer that the condition existed prior to the time the decedent began using the bascart. She asserts, however, that by merely showing that the plaintiff's decedent was injured by a loose wire, she is entitled to have the jury determine whether the injury was attributable to the negligence of the appellee. This Court's holdings in *Kelly, Brodsky* and many of the other cases cited above clearly dictate a contrary conclusion.

In *F. W. Woolworth* v. *Williams, supra*, a judgment was rendered in favor of the appellee who allegedly slipped and fell on a grease spot in the aisle of appellant's store. This Court *reversed*, stating that

> the mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant. . . . The defendant is not an insurer against accident to persons entering its store for the purpose of making purchases or otherwise. Until it is established that the accident was occasioned through the negligence of defendant's employees, or as the result of the existence of a condition of which defendant had either actual or constructive notice, there can be no recovery. [*Id.* at 348, 41 F.2d at 971.]

There, as in the present case, the plaintiff made no attempt to show how or by whom the condition was created or how long it existed. She merely relied upon the happening of the accident itself as the basis for her recovery. But in this Court's view that was not sufficient to carry the case to the jury. For it stated that the plaintiff "cannot sustain her case by merely showing that a spot was there. The burden rests upon her to establish the presence of the circumstances which charged the defendant with responsibility therefor. This she failed to do, but rested her case solely on the existence of a spot on the floor." [*Id.* at 348, 41 F.2d at 971.]

The appellant relies upon *Hellyer* v. *Sears, Roebuck & Co.*, 62 App.D.C. 318, 67 F.2d 584 (1933), and *Market Company* v. *Clagett*, 19 App.D.C. 12 (1901), as authority for her assertion that she need not produce evidence of notice of the defect in order for the case to go to the jury. Her reliance upon those decisions is misplaced. For in both *Hellyer* and *Market Company* there was evidence to show that the condition existed for a substantial period of time and that the storekeeper knew or in the exercise of reasonable care should have known of it and taken precaution to guard against injury. See *Brodsky* v. *Safeway Stores, Inc.*, n.2, *Id.* at 301, 152 F.2d at 677.

Wollerman v. *Grand Union Stores, Inc.*, 47 N.J. 426, 221 A.2d 513 (1966), is also cited by the appellant as requiring the appellee to go forward with the burden of the evidence once the customer-plaintiff introduced evidence that she was injured by slipping upon a foreign substance. This is neither the law of the District of Columbia nor does that case present a factual situation comparable to the present case. In *Wollerman* the plaintiff slipped and fell upon string beans which were on the floor near the produce bin. An employee of the store was standing nearby. The court stated that where greens are sold from an open bin there is the likelihood of some falling to the floor. In the court's opinion there was a substantial risk of injury implicit in the manner in which the storekeeper conducted his business and it was fairly probable that the operator was responsible either in creating the hazard or permitting it to arise or continue.

No such inference can be drawn in this case. Loose wires upon bascarts do not occur with nearly the degree of frequency as does the appearance of foreign substances upon a supermarket floor. In addition, there is no substantial risk of injury inherent in the use of bascarts. And viewing the totality of the circumstances presented by the evidence, it is not fairly probable that the appellee is responsible either for creating the defect or permitting it to arise or to continue for a substantial period of time.

All of the testimony construed in its most favorable light to the appellant clearly fails to establish that the loose wire was created by the appellee or that it had any notice of its existence. There is no evidence as to the condition of the bascart when it was received by the appellant's decedent, nor is there any evidence as to when and how the defect arose. If such evidence is absent, as the record in this case reflects, the appellee is entitled to judgment as a matter of law.

II. THE FREQUENCY OF INSPECTION IS IMMATERIAL IN THE ABSENCE OF EVIDENCE OF WHEN THE DEFECT AROSE.

A failure to make an inspection does not create liability unless the inspection, if made, would have disclosed the particular defect which makes the use of the bascart harmful to others. RESTATEMENT (SECOND) TORTS, Explanatory Notes, § 303, Comment c (1965). There is no evidence in the record that had the bascart been inspected on a daily basis, or indeed each time it was used by a customer, that the loose wire would have been discovered. The record is silent as to when the wire came loose, a fact which is freely admitted by the appellant in her brief. But she asserts that the issue of frequency of inspection alone, without evidence of when the defect arose, is sufficient to carry the case to the jury, citing *Hellyer* v. *Sears Roebuck & Co.*, *supra*, *Market Company* v. *Clagett*, *supra*, and *District of Columbia* v. *Richards*, 75 App.D.C. 349, 128 F.2d 297 (1942), as her authority.

In *Hellyer* the plaintiff tripped on a metal flashing which extended over the surface of a tread of a step and was screwed down. The evidence indicated that this condition existed for at least three days prior to the plaintiff's fall. Likewise in *Market Company* v. *Clagett* there was testimony indicating that the condition which caused the plaintiff to fall was present in the aisleway for a period of from 15 minutes to 3 hours before the fall. And in *District of Columbia* v. *Richards*, this Court in defining the issues, states that it must determine whether the District of Columbia had knowledge or constructive notice of the water and ice on the floor and failed to correct the condition. There was evidence that the ice water was on the floor for a substantial period of time before the plaintiff's fall. There was also evidence that this condition resulted from the failure of the District of Columbia to clean a drain which had been clogged for some time.

Thus, in each of the cases cited by the appellant the issue of the frequency of inspection was submitted to the jury only after evidence of the period of time during which the condition existed had been presented. This evidence provides the framework in which the jury can judge whether, in light of all of the circumstances, the storekeeper exercised reasonable care in inspecting the premises. In the absence of evidence of when the condition first arose or became known, the jury can only speculate what the effect of more frequent inspections would be and thus would have no basis for judging the appellee's conduct. Accordingly, the trial judge correctly directed a verdict for the appellee.

Moreover, the evidence of inspection, or the lack thereof, did not create a *prima facie* case of negligence. The bascart had been inspected two weeks prior to the incident. This can hardly be said to be unreasonable in the light of Mr. Perkey's experience that for the previous 19 years he discovered loose wires on only two or three occasions. Hence, the probability of injury from a loose wire was extremely remote and a need for more than monthly inspections was not indicated by the circumstances.

CONCLUSION

Appellant has clearly failed to present evidence that the appellee had notice of or created the alleged unsafe condition complained of. Thus the trial court properly directed a verdict in favor of appellee on the ground that there was not sufficient evidence presented wherein the jury could reach a satisfactory conclusion. And, accordingly, the appellant failed to establish a case of negligence as a matter of law.

Respectfully submitted,

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Of Counsel

EXPLANATORY NOTE

The printer inadvertently omitted from the Joint Appendix a portion of the deposition of Gilbert J. Perkey which was read at the trial and designated by the appellee to be printed in the Joint Appendix. That testimony is reprinted here in order to avoid a reprinting of a portion of the Joint Appendix.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,556

BETTY ANN ZIMMERMAN, Administratrix
of the Estate of Bessie Lee Junes, Deceased,
Appellant,

v.

SAFEWAY STORES, INC.,
Appellee.

EXCERPTS FROM DEPOSITION OF GILBERT JACKSON PERKEY

[1] Washington, D. C.
Monday, June 7, 1965

* * * *

[3] GILBERT JACKSON PERKEY,

a witness, was called for examination by counsel for the plaintiff and, having been first duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. FEISSNER:

[15] Q. And when she went to put them in the cart was when she cut her hand?

A. Right.

Q. Where did you get that information from, sir?

A. From her.

Q. Was there anything else that she told you about how she was hurt?

A. That she should have noticed the wire and that she felt it was her fault for not noticing the wire.

Q. She said that herself?
A. Yes.
Q. Without questioning from you?
A. Right.
Q. She volunteered that?
A. Right.

* * * *

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

271

No. 21,557

BETTY ANN ZIMMERMAN,
Administratrix of the
Estate of Bessie Lee Junes,

Appellant,

v.

DR. LEONARD J. HANTSOO,

Appellee.

Appeal from the United States District
Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. In a wrongful death action resulting from medical malpractice, is expert testimony that deficiencies in treatment were an aggravating factor in a patient's death sufficient evidence to submit the case to the jury?

2. On the facts of this case did the trial court erroneously inhibit Plaintiff's medical expert's testimony?

3. May a party Defendant's deposition be read into evidence subject to pertinent objections, notwithstanding the fact that the Defendant is present in the court room?

4. In a wrongful death action resulting from medical malpractice, may the Plaintiff prove the monetary loss to the Decedent's mentally retarded son as a result of the Decedent's untimely death?

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No. 21,557

BETTY ANN ZIMMERMAN,
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Appellant,

v.

DR. LEONARD J. HANTSOO,

Appellee.

Appeal from the United States District
Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based upon the Act of October 31, 1951, 65 Stat. 726, as amended, 28 U.S. Code, sec. 1291.

STATEMENT OF THE CASE

On July 1, 1963 Plaintiff's Decedent, Bessie Lee Junes, was a customer in a market owned by Safeway Stores, Inc., Appellee in companion Appeal, No. 21,556, and was using a shopping cart provided by the store for the purposes for which the cart was provided. As Decedent placed one of her purchases in the basket of the cart, a broken, loose, steel wire that protruded from the side of the basket stabbed Decedent in her right forearm and caused a three centimeter puncture type wound. Personnel from Safeway applied rudimentary first aid to the wound but even the application of several bandages was insufficient to stem the flow of blood. (J.A. 18, 19, 36-38, 47-49, 124-125)

On July 2, 1963 Decedent went to the medical offices of her family physician, Dr. Leonard J. Hantsoo, Appellee, for treatment of the injury. Appellee, after debridement of the injured area, applied a bandage, and gave the Decedent a shot of tetanus toxoid in her upper right arm. (J.A. 61-63) Decedent was told to return to the Appellee's office on July 5th, but Decedent, having become bedridden, was unable to keep her appointment at the doctor's offices and the Appellee instead twice came to the Decedent's home on that day. (J.A. 36-41, 47-50, 55-58)

Dr. Hantsoo's treatment consisted solely of changing the bandage, notwithstanding the fact that Decedent was bedridden, feverish, generally weak and nauseous and her arm was very swollen, inflamed and very hard. (J.A. 60-78)

During the next ensuing two weeks Decedent continued to manifest the above symptoms. (J.A. 36-41, 47-50, 55-58) While the doctor made four separate house calls to tend the bedridden Decedent on the 8th, 12th, 15th and 18th of July, the entirety of his treatment consisted of changing Decedent's bandages. (J.A. 60-78)

On the morning of July 21st Decedent became unconscious and was rushed to Casualty Hospital where she died on July 24, 1963, as a result of a Cerebral Vascular Accident. (J.A. 40-41, 76)

During the entire period from July 2nd through July 21st, Dr. Hantsoo was the attending physician but at no time other than on July 2nd did he give medical aid to Decedent other than changing her bandages. During this period the Decedent continued to remain bedridden, weak, feverish and nauseous and her arm remained red and swollen and the large baseball size knot on her upper right arm did not diminish. (J.A. 36-41, 47-50, 55-58) While the initial puncture opening of the wound made some progress towards healing, the area had not fully healed and was still discolored when Decedent was admitted to the hospital. (J.A. 41, 50, 54-55)

On July 24th, 1964, Appellant, having been qualified as Administratrix of the estate of Bessie Lee Junes, the Decedent, filed suit against Dr. Leonard J. Hantsoo for the Decedent's wrongful death as a result of the Defendant's medical malpractice. (J.A. 4-6, 15) Upon trial of this action and the consolidated suit filed against Safeway Stores, Inc., a companion Appeal (No. 21, 556) Appellant called as lay witnesses herself, her husband, Decedent's sister and two employees of Safeway Stores, Inc. who testified to the facts above. (J.A. 17, 35, 47, 55, 126)

Appellant then called as her expert witness James Chapman, M. D., who testified upon the basis of an all inclusive hypothetical question that there were deficiencies in the Appellee doctor's treatment of the deceased and that these deficiencies did not meet the standard of care exercised by like physicians practicing in this area, and that the proper treatment for Decedent would have enhanced her likelihood of recovery and shortened her disability. (J.A. 80-101) Appellant's medical expert

further testified that there was a relationship between the deficiencies in treatment and the Decedent's ultimate demise and that the specified deficiencies were an aggravating factor in her demise. (J.A. 102)

At the close of the evidence notwithstanding the lay witness' testimony, the exhibits in evidence and the Court Reporter's transcription of the medical expert's testimony, the Trial Court granted Dr. Hantsoo's Motion for Directed Verdict on the grounds there was no relationship between the deficiencies in treatment and Decedent's ultimate demise. (J.A. 134-144)

Appellant, on November 17, 1967, duly noted an Appeal to this Court from the trial court's ruling and Order granting Appellee's Motion for Directed Verdict. (J.A. 146-147)

STATEMENT OF POINTS

1. The Lower Court erred in directing a verdict for the Defendant since there was sufficient evidence that the Defendant's negligent treatment was an aggravating factor in the Decedent's ultimate demise.

2. The Lower Court erred in inhibiting Plaintiff's expert witness' testimony on Direct Examination.

3. The Lower Court erred in ruling that the Plaintiff could not introduce the Defendant's Deposition into evidence, notwithstanding the Defendant's presence at the trial.

4. The Lower Court erred in refusing to allow Plaintiff to prove the monetary loss to Decedent's retarded son as a result of Decedent's death.

SUMMARY OF ARGUMENT

1. Plaintiff's expert medical testimony clearly showed that there was a deficiency in Decedent's medical treatment, that the deficiency was below the standard of care exercised by like physicians in this area, that proper treatment would have enhanced Decedent's likelihood of recovery and shortened her disability and that the medical deficiencies aggravated Decedent's ultimate demise. It was therefore error to grant the Defendant's Motion for Directed Verdict.

2. The trial court unnecessarily and prejudicially inhibited Plaintiff's expert witness' testimony.

3. A party Defendant's Deposition may be introduced into evidence subject to pertinent objections, notwithstanding the presence of the Defendant in the court room.

4. In a wrongful death action it is erroneous to exclude evidence of the financial loss to the Decedent's mentally retarded son, as a result of the Decedent's death.

ARGUMENT

I.

IN A WRONGFUL DEATH ACTION, EXPERT TESTIMONY THAT DEFICIENCIES IN MEDICAL TREATMENT WERE AN AGGRAVATING FACTOR IN THE PATIENT'S DEMISE ESTABLISHES A PRIMA FACIE CASE, AND IT IS ERRONEOUS TO GRANT THE DEFENDANT A DIRECTED VERDICT.

The expert testimony presented by the Plaintiff in this action was entitled to be construed most favorably to the Plaintiff upon Defendant's Motion for Directed Verdict, and the Plaintiff was further entitled to every legitimate inference from all the evidence to support her contentions. *Shewmaker v. Capital Transit Co.*, 79 App. D.C.

102, 143 F.2d 142 (1944). The visiting trial judge, possibly because of his basic lack of familiarity with the applicable law of the District of Columbia, did not in fact grant the Plaintiff her full rights.

The testimony of Plaintiff's expert witness, (J.A. 91-102) was to the effect that based upon the hypothetical question propounded to him and the evidence as presented in Court (J.A. 36-41, 47-50, 55-58) there were deficiencies in the treatment accorded the Decedent during her illness (J.A. 94-98) and that these deficiencies were below the standard of acceptable care exercised by like physicians in this area. (J.A. 87-88, 95-98) In addition, that there were negligently several undiagnosed complications occurring in the Decedent's body (J.A. 89-90, 98-100) and that proper treatment would have reduced the Decedent's suffering and enhanced her likelihood of recovery (J.A. 100-101) and finally, that the deficiencies in the Decedent's treatment were casually related to her demise, and that the deficiencies were an aggravating factor in the Decedent's death. (J.A. 101-102)

Notwithstanding the evidence, the trial court was of the opinion that Plaintiff had failed to establish a prima facie case in medical malpractice, and/or that the negligence was not casually related to the Decedent's death. (J.A. 129, 134-146) It is respectfully submitted that the trial court was in gross error not only in Directing a Verdict for the Defendant doctor but also in failing to utilize Federal Rule 50 to avoid undue expense. (J.A. 131)

It can be undisputed and this Court has recognized that:

> "Malpractice is hard to prove. The Physician has all of the advantages of position*** What therefore might be slight evidence when there is no such advantage, as in ordinary negligence cases, takes on greater weight in malpractice suits*** Generally speaking,

> direct and positive testimony to specific acts of negligence is not required***" *Goodwin v. Hertzberg,* 91 App. D.C. 385, 201 F.2d 204 (1952)

Thus, in *Winstead v. Hildenbrand,* 81 App. D.C. 368, 159 F.2d 25 (1947) the Court had an occasion to review a case legally identical to the instant matter. In *Winstead,* a patient suffering from cerebro-spinal syphilis, a disease that can cause blindness, the patient was injected with a drug that requires constant attention to the patient's eyes to determine if the continuing use of the drug itself is causing blindness.

Upon proof of these facts and medical testimony of the accepted standard of treatment in such cases the lower court refused to instruct the jury on the issue of whether the failure to exercise a continuous examination of the patient's eyes was the proximate cause of the blindness. This Court, in reversing and remanding for a new trial ruled that the standard of care having been established, a departure shown, and an adverse result having occurred, since either the syphilis or the drug could have caused the blindness, the issue should have been presented to the jury.

In the instant case, the patient was suffering from hypertension and died of a cerebrovascular accident (C.V.A.). The standard of care was established and a departure from this standard was shown. The expert testimony was clearly that the deficiencies in treatment were related to the patient's demise, and that not only would the correct care have enhanced her likelihood of recovery and shortened her disability, but that the deficiencies in fact aggravated her demise. (J.A. 98-102)

In both the instant case and in *Winstead,* there were two possible causes of the injury. In *Winstead,* syphilis or a failure to continuously examine and in the instant case an unrelated "stroke" or the deficiencies in treatment. Under the ruling in

Winstead, it is submitted that it is for the jury alone to determine which of these in fact was the case.

It is of course conceded that the Decedent in the instant case was suffering from hypertension and that hypertensive persons are more likely to experience a C.V.A. than do other persons, but the law has long recognized that a negligent party takes the injured person as he finds him and this must be even more true when, as in the instant case the negligent party is completely aware of the pre-existing condition. (J.A. 61-63) In *Fisher v. Small* 166 A.2d 744 (D.C. Mun. App. 1960) the Court had an opportunity to review a case of aggravation of a pre-existing condition. In *Fisher* the Plaintiff had a long history of hypertension, headaches, seizures, etc. and brought suit for aggravation of these conditions when she was hit by a piece of falling glass. The Court clearly ruled that Appellant's contention of aggravation of the pre-existing condition "was clearly one for the jury". Accord: *Guenther v. Metropolitan Railroad Company,* 23 App. D.C. 493 (1904).

In view of the fact that even circumstantial evidence of medical malpractice is sufficient to establish negligence, *Christie v. Callahan* 75 App. D.C. 133, 124 F.2d 133 (1941) and in view of the direct and positive expert testimony of the Defendant's negligence in this case, and that this negligence aggravated the patient's ultimate demise, it is submitted that the lower court was in error not only in refusing to use the procedures outlined in Rule 50, but also in directing a verdict for the Defendant when all of the legitimate inferences of the evidence presented clearly established a breach of the physician's duty and a casual relationship between that duty and the patient's death.

II

THE TRIAL COURT PREJUDICIALLY AND ERRONEOUSLY INHIBITED PLAINTIFF'S EXPERT WITNESS' TESTIMONY

The factual surroundings of this case, while outlined in the Statement of the Case, *supra*, must necessarily be expanded to present the prejudicial error committed by the trial court in refusing to allow Plaintiff's expert witness to testify to the "usual prognosis" of injuries such as decedent had incurred. Decedent was a short, overweight woman in her middle sixties and unquestionably suffered from hypertension that would cause her to be more susceptible to incurring a C.V.A. than would the average person. (J.A. 101) Furthermore, the Defendant was clearly aware of this condition. (J.A. 61-65)

Whether the Decedent's injury was a "scratch" as the Defendant testified, or a "puncture type wound" as the Plaintiff's witnesses stated, is of no real consequence. The Decedent clearly had an injury to her arm and the wound itself was slow to heal. (J.A. 36-41, 47-50, 55-58) While there was a conflict in the evidence as to whether the wound had completely healed by July 18th, the Plaintiff is entitled to have the evidence construed most favorably to her and to the effect of every legitimate inference therefrom. *Goodwin, supra.*

The actual thrust of the Plaintiff's case in the instant matter was a combination of misfeasance and nonfeasance, on the part of the Defendant resulting in an aggravation of the Decedent's pre-existing condition that resulted in her death. Evidence presented was to the effect that the Decedent's arm did not heal completely for at least sixteen (16) days, and that there existed in the Decedent's arm during this period either an ascending infection or a cellulitis reaction to the shot administered, or both. (J.A. 98-99) The evidence further proved that the bodily reaction to either or both of these

conditions caused a strain on the Decedent's system that aggravated her pre-existing hypertension condition and aggravated her ultimate death of a C.V.A. (J.A. 98-102)

Plaintiff proffered by her expert witness that the usual prognosis for injuries of this nature was a complete healing within seven (7) to ten (10) days and in view of the evidence presented, this testimony became acute to the Plaintiffs' case-in-chief. Since the usual prognosis for the injury was seven (7) to ten (10) days, a minimal time of healing of sixteen (16) days clearly indicated that there was more to the injury than a simple "cat like scratch".

The fact that Decedent was unable to come to the Defendant's offices for treatment and that she was in fact bedridden, nauseous, feverish and weak and that her arm was red, hard and swollen, clearly supports Plaintiff's contention that the Defendant was negligent in failing to diagnose the Decedent's complete condition.

When Plaintiff's expert witness attempted to testify as to the "usual prognosis" with respect to the injury the trial court sustained Defendant Hantsoo's objection and Plaintiff was then given an opportunity to make her proffer of the expected reply. (J.A. 105-108) This Court clearly ruled that the "usual prognosis" for an injury is clearly admissable in a medical malpractice action. In *Chambers v. Tobin*, 92 App. D.C. 274, 204 F.2d 732 (1953) a lower court ruled that the usual prognosis for a "Colle's fracture" was inadmissable in a medical malpractice action for the negligent setting and treatment of the Plaintiff's broken wrist. In reversing and remanding this action the Court ruled that the usual prognosis of an injury is clearly admissable.

In view of the fact that the "usual prognosis" of the injury which Decedent sustained was seven (7) to ten (10) days and in view of the fact that the injury had not completely healed within sixteen (16) days at a minimum, the exclusion of this evidence

was prejudicial to the Plaintiff's case. Since the wound did not heal within the "usual" time it is clearly obvious that there were further complications, and that these complications, according to the medical expert, aggravated the Decedent's ultimate death and should have been discovered by the Defendant.

The "usual prognosis" was then a definite link in Plaintiff's malpractice action since there was an obvious necessity to take further precautions than to simply change a bandage and "stand and wait".

III

A DEFENDANT PARTY'S DEPOSITION MAY BE INTRODUCED INTO EVIDENCE, NOTWITHSTANDING THE FACT THAT THE DEFENDANT IS PRESENT IN THE COURT ROOM.

Plaintiff in this action had taken the Deposition of the Defendant and who had been represented by counsel at the Deposition, and the Deposition had been duly filed in the Court Jacket. (J.A. 59-60) At the trial of this matter, even though the Defendant was, in fact, present in the Court room, Plaintiff offered the Defendant's Deposition into evidence, subject to objections that had been raised at the Deposition as to certain questions. Upon objection by the Defendant and after presentation by the Plaintiff of the myriad case law on the subject, and Federal Rule 26 itself, the trial court committed the gross and prejudicial error of ruling that the presence of the Defendant in the court room prohibited the use of his Deposition as primary evidence and restricted its use to impeachment only. (J.A. 59-60, 66) The action manifestly constitutes reversible error. Federal Rule 26(d)(2) provided, in substance, that at trial:

> "the Deposition of a *party* . . . may be used by an adverse party for *any purpose.*" (Emphasis supplied)

Even with this simple compelling mandate alone, the trial court should have realized Plaintiff had the absolute right to introduce the Defendant's Deposition. The authorities proffered to the trial court are in complete agreement that the Plaintiff's position is correct. *Moore's Federal Practice,* Vol. 4, § 26.26, page 1663, *Riley v. Layton,* 329 F.2d 53 (10th Cir. 1964), *Pursche v. Atlas Scraper and Engineering Co.,* 300 F.2d 467 (9th Cir. 1962), and *Pfotzer v. Aqua Systems,* 162 F.2d 779 (2nd Cir. 1947).

Without unduly belaboring the point, the case of *Merchants Motor Freight, Inc. v. Downing,* 227 F.2d 247 (8th Cir. 1955) is precisely in point. In that case the Plaintiff examined the Defendant on the witness stand and certain discrepancies appeared between the trial testimony and the testimony given at the Deposition. Plaintiff then offered all, and later parts of the Deposition directly into evidence. The trial court sustained the Defendant's objection. In reversing and remanding for a new trial the Court stated:

> "Under the rule (26) hereinabove quoted, the Plaintiff was entitled to introduce into evidence the Defendant's Deposition, subject to the Court's right to exclude such parts thereof as might be unnecessary or *repetitious* in relation to the witness' testimony on the stand." (Emphasis supplied)

It is submitted that if the Plaintiff in the above case were allowed to introduce the Defendant's Deposition into evidence *after* the Defendant had testified, that in the instant case, the Defendant's Deposition clearly should have been admitted before the Defendant was called to testify. In the instant case there was no possibility of repetitious matter since there was in fact no testimony from the Defendant.

In the instant action, material discrepancies between the Defendant's testimony both as to the treatment the Defendant gave the Decedent during the period from July 2nd through July 18th and as to the condition of the Decedent's wound on July 18th, clearly prejudiced the Plaintiff's case. (J.A. 22-35) Appellee's counsel's assertions are contrary to law which he was, and is, eminently aware of.

IV

EVIDENCE OF THE DECEDENT'S MENTALLY RETARDED SON'S FINANCIAL LOSS AS A RESULT OF DECEDENT'S DEATH IS ADMISSABLE IN A WRONGFUL DEATH ACTION.

The evidence presented by Plaintiff conclusively showed that Decedent had provided a home and some degree of financial assistance to her mentally retarded son. (J.A. 36, 58) Plaintiff further attempted to prove the exact degree of dependency of the son on his deceased mother but the trial court for reasons known only to itself sustained an objection to this testimony. (J.A. 58)

Since this action was brought by Plaintiff as daughter and Administratrix of the estate of Bessie Lee Junes, deceased, under the wrongful death statute, D. C. Code, Title 16, § 2701, the measure of damages to the mentally retarded son, as a result of Decedent's death was clearly admissable. The applicable statute provides in substance that

> "the damages shall be assessed with reference to the injury resulting from the act, neglect or default causing the death to the spouse and the next of kin of the deceased person. . ."

Without great discussion, it is obvious that the death of the Decedent has caused her mentally retarded son to incur damages since she in fact partially, and at times,

completely supported him. The exclusion of evidence regarding the degree of financial dependence is therefore clearly erroneous.

CONCLUSION

In view of the foregoing arguments, Appellant prays this Court reverse and remand the instant action with directions to Vacate the Order Granting Defendant's Motion for Directed Verdict and to grant the Appellant a new trial.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,557

BETTY ANN ZIMMERMAN, Administratrix of the Estate of Bessie Lee Junes,
Appellant,

vs.

DR. LEONARD J. HANTSOO,
Appellee.

Appeal from the United States District Court for the District of Columbia

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STATEMENT OF QUESTION PRESENTED

In the opinion of Appellee the question is: Was the lower Court justified in directing a verdict in favor of Appellee?

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No. 21,557

BETTY ANN ZIMMERMAN, Administratrix of the Estate of Bessie Lee Junes,

Appellant,

vs.

DR. LEONARD J. HANTSOO,

Appellee.

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

On July 1, 1963, Plaintiff's Decedent, Bessie Lee Junes, sustained an injury to her right forearm, said injury being variously described as a "scratch which just nicked the skin" (J.A. 20), a "puncture wound" (J.A. 37), a "small laceration" (J.A. 62) and a "break in the skin about a half inch to an inch long" (J.A. 125). There was some bleeding, which stopped after the application of a second Band-Aid (J.A. 125).

On July 2, 1963, Decedent consulted appellee, Dr. Leonard J. Hantsoo, for treatment of the injury. Dr. Hantsoo debrided the injured area (J.A. 68); applied a Band-Aid with antibiotic ointment and also administered an injection of tetanus toxoid (J.A. 62).

Dr. Hantsoo testified that the scratch on Decedent's arm was infected and showed signs of inflammation on July 2, 1963, (J.A. 67, 68). After his initial treatment, he saw the patient next on July 5, 1963 (Twice) (J.A. 63), and thereafter on July 8, 12, 15 and 18, 1963 (J.A. 65-69). The wound was slow to heal, which Dr. Hantsoo attributed to the patient's age and high blood pressure. (J.A. 69)

The Decedent was admitted to Casualty Hospital on July 21, 1963. She was given a physical examination at the time of admission, and the hospital records contain no notation of any inflammation, redness or swelling on her arm. If any such symptoms were present, standard hospital practice would require that they be recorded. (J.A. 76). When she entered the hospital, Decedent's temperature was recorded as 98.4° (J.A. 77).

While still in the hospital, Decedent expired on July 24, 1963, as a result of a Cerebral Vascular Accident (J.A. 76).

The Decedent had a history of high blood pressure dating back several years. (J.A. 23, 24, 74). Dr. Hantsoo testified that persons with high blood pressure have a much greater chance of experiencing a Cerebral Vascular Accident than do people with normal or low blood pressure. (J.A. 77). Both Dr. Hantsoo and Dr. John A. Wagner, an expert witness called by Safeway Stores, Inc., testified that there was no causal connection between the scratch sustained by Decedent on July 1 and her subsequent death on July 24th. (J.A. 77, 113).

Appellant called as her expert witness James Chapman, M.D. He testified on direct examination that, in his opin-

ion, according to accepted medical practice, Dr. Hantsoo's treatment of Decedent's scratch should have included administration of an oral antibiotic and application of a moist dressing (J.A. 96).* When questioned as to the relationship, if any, between the "deficiencies" in the treatment of Decedent's arm injury and her ultimate demise, Dr. Chapman testified that "Her failure to receive adequate treatment and promulgation (sic) of her illness during the period between the 5th of July and the 24th of July was an aggravating factor in her demise." (J.A. 102). Dr. Chapman prefaced the foregoing testimony with this disclaimer: "the exact cause of what we call a Cerebral Vascular Accident you cannot specify or pinpoint . . . We can list who is more likely to have a stroke or under what conditions, but it is very difficult to pinpoint one cause as the cause of strokes . . ." (J.A. 101)

SUMMARY OF ARGUMENT

Conceding *arguendo*, that the testimony of Appellant's expert witness was sufficient to create a jury question as to whether appellee's treatment of Decedent's injury was in accord with the accepted standard of practice; nevertheless, appellant totally failed to establish a *prima facie* case with respect to the element of causation. The testimony of plaintiff's expert with reference to causation was ambiguous and contradictory, and the trial court rightly refused to let the jury speculate on this issue.

The remaining points urged by Appellant as grounds for reversal are totally without merit, and the rulings complained of in no way prejudiced appellant.

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* On cross-examination, Dr. Chapman admitted that at the time of his deposition he had not testified that the additional measures (dressing and oral antibiotics) were required as a matter of medical practice, but rather were discretionary precautions which the treating physician might or might not apply in the exercise of his medical judgment. (J.A. 103).

ARGUMENT

I

APPELLANT'S EVIDENCE WITH RESPECT TO CAUSATION FAILED TO ESTABLISH A PRIMA FACIE CASE AND THE TRIAL COURT PROPERLY DIRECTED A VERDICT

The appellant seeks to hold the appellee responsible for the death of her Decedent as a result of a Cerebral Vascular Accident (CVA). The basis of this claim is that appellee allegedly failed to properly treat the scratch sustained by Decedent and that said lack of care proximately caused Decedent's subsequent CVA.

Appellant's only expert witness, Dr. Chapman, testified that the measures instituted by Appellee for the treatment of the aforesaid scratch, namely debridement, antibiotic ointment, bandaging and injection of tetanus toxoid, were not adequate. In Dr. Chapman's opinion, good practice would require additional procedures, such as administration of oral antibiotics and application of a moist dressing. Assuming, *arguendo*, that said testimony was sufficient to create a jury question as to whether appellee's treatment conformed with good and approved practice, appellee submits that there was no evidence which would properly permit a jury to infer that appellee's treatment of Decedent proximately caused her to undergo a CVA which in turn resulted in her death.

In order to carry her burden with respect to the element of causation on a motion for a directed verdict, it was incumbent upon appellant to have introduced more than a scintilla of evidence on this point. *Gunning* v. *Cooley*, 58 App. D. C. 304, 30 F. 2d 467, affirmed 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720; *Christie* v. *Callahan*, 75 U. S. App. D. C. 133, 124 F. 2d 825; *S. S. Kresge Co.* v. *Kenney*, 66 App. D. C. 274, 86 F. 2d 651. And such evidence must be adduced through the testimony of wit-

nesses skilled in medicine and surgery. *Cayton* v. *English*, 57 App. D. C. 324, 23 F. 2d 745; *Ewing* vs. *Goode*, 78 F. 442; *Rogers* vs. *Lawson*, 83 U. S. App. D. C. 281, 170 F. 2d 157.

Appellant relies upon the testimony of Dr. Chapman, pertinent portions of which are set forth in pages 101 and 102 of the Joint Appendix. Appellee submits that said testimony does not make out a *prima facie* case.

The fact that a plaintiff in a malpractice action introduces some expert testimony does not automatically guarantee jury consideration of his claim. The trial court still has the duty to make a preliminary determination as to whether the evidence is "so thin that it would be dangerous for the jury to consider it." *Christie* v. *Callahan*, supra. In a malpractice action, proof of a possibility that the plaintiff's injuries resulted from the defendant's negligence or culpable want of skill is insufficient, and if, on the evidence equally probable causes of injury are presented, for one or more of which the defendant is not responsible, the jury should not be permitted to guess, speculate or surmise as to the actual cause. *Ewing* v. *Goode*, supra; *Kasmer* v. *Sternal*, 83 U. S. App. D. C. 50, 165 F. 2d 624; *Buchanan* v. *Downing*, 394 P. 2d 269; and see 13 A.L.R. 2d. 24 and cases collected therein.

In her brief, appellant states that in the instant case there were two possible causes of the death; an unrelated "stroke" or the alleged deficiencies in treatment. She argues that the case of *Winstead* v. *Hildenbrand*, 81 U. S. App. D. C. 368, 159 F. 2d 25 would require that the jury make the determination as to which was in fact responsible. But in *Winstead*, there was evidence that the patient experienced symptoms which admittedly were a definite indication that the *treatment* was causing an adverse affect. Where, as here, the record discloses nothing but a bare possibility of a causal connection between the treatment and the injury, the applicable rule is set forth in *Kasmer* v. *Sternal*, supra.

In testing the sufficiency of the evidence with respect to causation, Dr. Chapman's testimony must be compared with the concept of proximate cause as it has been defined by this Court, namely: "that cause which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury *and without which the result would not have occurred.*" (emphasis added) *Howard* v. *Swagart*, 82 U. S. App. D. C. 147, 161 F. 2d 651; *S. S. Kresge Co.* v. *Kenney*, supra.

Dr. Chapman began the material portion of his testimony (J.A. 101) with the admission that it is impossible to determine what causes a CVA or "stroke." The best that medical science can do is classify those types of individuals who are more likely candidates for a stroke. Because of her hypertension, the Decedent admittedly fell within the high risk category.

Dr. Chapman then proceeded to directly contradict himself by stating that appellee's alleged inadequate treatment of Decedent was an "aggravating factor" in her demise.

Despite ample opportunity, counsel for appellant did not pursue the matter further. The witness never explained what he meant by "aggravating factor." Whatever it was Dr. Chapman was trying to say, he certainly did not testify that appellee's treatment of Decedent was a "cause . . . without which the result would not have occurred."

It is, of course, correct to say, as appellant points out, that on a motion for a directed verdict the evidence must be construed most favorably to the plaintiff and she is entitled to the full effect of every legitimate inference. However, in this case, based upon the state of the record at the conclusion of all the evidence, to have submitted the matter to a jury would have required it to engage in pure speculation. The lower court was correct in ruling that the evidence would not properly support an inference that anything appellee did or failed to do proximately caused Decedent to undergo a C.V.A.

II

THE REMAINING POINTS URGED BY APPELLANT DO NOT WARRANT REVERSAL

In addition to the foregoing question as to the sufficiency of the evidence, appellant urges reversal on various other grounds. A brief examination of those points clearly establishes that they are without merit and the rulings complained of in no way prejudiced appellant.

A. The lower Court did not inhibit the testimony of plaintiff's expert witness.

The lower court declined to permit Dr. Chapman to testify with regard to the "usual prognosis" for the type of injury sustained by Decedent to her arm. This ruling was correct since the proffered testimony would have no relevance to the issues under consideration. Furthermore, the question failed to take into consideration the patient's age and hypertension which, as appellee testified (J.A. 69), would prolong the healing process.

In any event, the question is rendered moot by the fact that the appellant did manage to introduce the desired testimony. In an answer which was remarkably unresponsive to the question asked, Dr. Chapman testified: "The wound, as described, was a wound which we would expect would respond to the following treatment within perhaps 7 to 10 days." (J.A. 87) This remark was not stricken. Under the circumstances, it is difficult to perceive how appellant can claim prejudice.

B. The lower court properly refused to receive the appellee's deposition into evidence.

Appellant contends that the trial court should have received appellee's deposition *in toto*. In this case, unlike those relied upon by appellant, appellee's deposition was offered before he testified. Also, since appellant made no

effort to specify those portions of the deposition that were deemed relevant, rejection of the entire deposition was a proper exercise of judicial discretion. *Pursche* v. *Atlas Scrapper and Engineering Co.* (C.A. 9th, 1962) 300 F. 2d 467; *United States* v. *United Shoe Machinery Corp.* (D.C. Mass. 1950) 93 F. Supp. 190.

Finally, appellee submits that if the lower court did commit error, it was harmless. During his examination of appellee, counsel for appellant quoted extensively from appellee's deposition in attempts to impeach the testimony of the witness. Appellant claims prejudice, but is unable to specify any non-cumulative probative evidence which she was deprived of by reason of the lower court's ruling. Any "material discrepancies" in the appellee's testimony would certainly have been highlighted by appellant's experienced counsel by way of the ordinary impeachment techniques.

C. The lower court did not exclude evidence of financial loss allegedly suffered by Decedent's son.

A review of page 58 of the Joint Appendix establishes that, contrary to appellant's assertions, the trial court did not exclude or improperly restrict evidence with respect to the financial relationship between Decedent and her son.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,557

BETTY ANN ZIMMERMAN,
Administratrix of the Estate of Bessie Lee Junes,
Appellant,

v.

DR. LEONARD J. HANTSOO,
Appellee.

Appeal from the United States District
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,577

BETTY ANN ZIMMERMAN,
Administratrix of the Estate of Bessie Lee Junes,
Appellant,

v.

DR. LEONARD J. HANTSOO,
Appellee.

Appeal from the United States District
Court for the District of Columbia

ARGUMENT

Appellant's Unimpeached Expert Medical Testimony Clearly Established a Prima Facie Case With Respect to "Proximate Cause"

Appellee's Brief Concedes that the only question presented is whether there was sufficient expert evidence to have the jury determine if the deficiencies in Appellant's Decedent's treatment were the proximate cause of Decedent's CVA which resulted in her death. While Appellee attempts to confuse the issue by stating that there must be

"more than a scintilla of evidence on this point" and that the jury should not be allowed to speculate where the "evidence is so thin that it would be dangerous for the jury to consider it," and that the "evidence must be adduced through testimony of witnesses skilled in medicine and surgery", Appellee has completely ignored the totality of Appellant's Medical Expert's Testimony which *begins* at page 78 J. A. and *ends* at page 108 J. A.

The proper rule in reviewing a Motion for Directed Verdict in a medical malpractice action was aptly and succinctly stated in *Christie v. Callahan,* 75 App. D. C. 133; 124 F.2d 651 to the effect that:

> *"Less than preponderance is sufficient.* How much less is hard to state abstractly. Commonly the case weighed to stand, is required to be substantial, more than a scintilla, such as reasonable man might believe. All of these are just different ways of saying that *less than preponderance is required,* but the evidence should not be so thin that it would be dangerous for the jury to consider. (At. page 135, emphasis supplied).

Appellant's Medical Expert established, and Appellee has conceded for the purposes of appeal, that the patient developed "complications" from the injury (J. A. 89), that additional treatment was indicated for these "complications", and that the additional treatment would include the taking of a "culture" to determine what oral antibiotic should be used, the use of the antibiotic by oral injection, the application of warm moist dressings to the injured area and, in the event the patient did not respond, hospitalization. (J. A. 90, 96, 97). Appellant's expert witness testified that the "complications" were an ascending infection in the patient's lower arm and affecting the lymph system, and a post-injection cellulitis in her upper arm. Appellant's medical expert further testified that as a result of the "complications" Decedent developed a general body reaction to the infection, and that it was at this point in the patient's medical career that the treatment aforesaid should have been given and that had this

treatment been given, it

> " . . . would have shortened the course of her disability and illness and greatly enhanced her likelihood of recovery." (J. A. 101)
>
> Appellant's medical expert witness then testified:
>
> "Q. Expressing your opinion within the realm of reasonable medical probability, was the deficiency of reasonable treatment on the ultimate demise of Mrs. Junes, responsible? A. I believe there was a relationship.
>
> Q. Expressing your opinion within the realm of reasonable medical probability, what was the relationship between her death and the injuries she received, with the subsequent treatment by the physician you have delineated to the court and the jury? A. If I may give an explanation with my answer: there is a relationship, but I would like to, if I may –
>
> Q. Explain what the relationship is. A. The exact cause of what we call a cerebral vascular accident you cannot specify or pinpoint –– you cannot specify or pinpoint a cause that this item always causes stroke. We can list who is more likely to have a stroke or under what conditions, but it is very difficult to pinpoint one cause as the cause of strokes so that when we scrutinize this case –– I was trying to determine if there was a reasonable relationship or any relationship here. My reasoning went this way.
>
> MR . WELCH: I don't think that is a proper way to testify.
> THE COURT: Sustained.
> BY MR. FEISSNER: Would you answer the question? What is the relationship between the deficiencies of treatment and the ultimate demise within the realm of reasonable medical probability? A. Her failure to receive adequate treatment and promulgation of her illness during the period between the 5th of July and the 24th of July was an aggravating factor in her demise.
>
> Q. Are you expressing that opinion within the realm of reasonable medical probability? A. Yes, sir."

It is upon the foregoing testimony that Appellee claims there exists only a "scintilla" of evidence. Notwithstanding the fact that Appellee's Counsel continually interjected himself into Appellant's expert witness' testimony, it is

clear upon the record that there was credible evidence from which the jury could have reasonably found that Appellee failed to diagnose and treat decedent's infectious state and that the bodily reaction to this infection "aggravated" decedent's admittedly pre-existing condition. Appellant's expert categorically stated that the deficiencies in treatment prolonged decedent's illness and disability (J. A. 101) and that the "promulgation" (*sic,* prolongation) of her illness aggravated her ultimate demise, which concededly was from a C.V.A.

Appellee has attempted to remove this case from the rule established in *Winstead v. Hildenbrand,* 81 App. D. C. 368, 159 F.2d 25, by stating that where there are two *possible* causes of death, the jury should not be allowed to speculate. Appellant's evidence, however, clearly shows first, that decedent died of a C.V.A., and, second, that the deficiencies in treatment allowed the infection and/or cellulitis to continue unchecked, placed a greater strain on her body, and aggravated her pre-existing hypertensive condition, resulting in a C.V.A. There are not two causes of death, but only death by a C.V.A. There are two possible causes of the C.V.A., but Appellant's expert stated with reasonable medical certainty that the prolongation of the illness, as a result of the deficiencies in treatment, aggravated the preexisting hypertensive condition which, in turn, caused the C.V.A.

It is noteworthy that in the instant case, as in *Hildenbrand* there was a physical phenomenon that determined the ultimate result. Neither Appellee, nor Dr. Wagner, acknowledged the existence of a "fever", the unhealed wound or any systemic or bodily reaction to the injury, and the resulting complications (J. A. 70, 122, 123), while Appellant's expert testified that the systemic infection signs of "weakness, dizziness, nausea" and fever were present and that the wound had not, in fact, healed at the time of hospitalization (J. A. 96, 105). It is the existence of the systemic reaction, as is partly evidenced by the unhealed wound, the fever and nausea that was the aggravating factor in the instant

case, and since the *facts* upon which this medical conclusion were based are susceptible to laywitness observation, the existence or non-existence of these physical conditions as in *Hildenbrand,* allowed the Appellant's expert to testify with reasonable medical probability that the deficiencies in treatment aggravated decedent's untimate demise, and it was for the *jury* to determine if these conditions actually existed.

Since the facts are to be construed most favorably to the Plaintiff upon Motion for Directed Verdict, and since these easily observable physical characteristics were testified to by three laywitnesses (J. A. 47-50, 55-58, 60-78), the lower Court erred in directing a verdict for Appellee. This question of conflicting testimony as to decedent's physical condition was a question for the jury.

The cases of *Howard v. Swagart,* 82 App. D.C. 147, 161 F.2d 651, and *Kresge Co. v. Kennedy,* 66 App. D.C. 247, 86 F.2d 651, cited by Appellee, do not overcome the law that an aggravation of a pre-existing condition is clearly a question for the jury, and an actionably tort under the cases of *Guenther v. Metropolitan Railroad Company,* 23 App. D.C. 493, and *Fisher v. Small,* 160 Atl 2d 744 (D.C. Mun. App.)

In view of Appellee's concession that there were deficiencies in decedent's treatment, and in view of the Appellant's expert testimony that these deficiencies prolonged decedent's illness which, in turn aggravated her pre-existing condition and ultimately brought about her demise, it is submitted that the lower Court was in error in granting Appellee's Motion for Directed Verdict, and the instant case should be reversed and remanded for a new trial.

II

The Lower Court's refusal to permit evidence of the "usual prognosis" was prejudicial

Appellee now concedes that expert evidence of the "usual prognosis" was admissible, but that its exclusion was not prejudicial, since a brief such statement was not stricken from the record when objected to initially (J.A. 87). Even a cursory reading of Appellant's proffer (J.A. 106-108) shows that the "Usual prognosis" for the injury was a complete healing in 7-10 days, and that "a reasonable and prudent physician would have done something else" besides change bandages, as is evidenced by Appellee's direct testimony (J.A. 79-116). Appellant further stated that the "usual prognosis" would be "as related to the particular individual" and that the instant case there is no question that the "particular individual" was the decedent.

In view of the fact that Appellant's medical expert testified that it was the prolongation of the illness that placed a strain on decendent's system, and that it was this strain that eventually aggravated her pre-existing hypertensive condition, which led to her death from a C.V.A., the "usual prognosis" for the healing of the wound took on crucial proportions. Both Appellant's medical expert (J.A. 97) and Dr. Wagner (J.A. 118) testified that a sustained systematic infection, and this decedent's bodily reaction to the same, would put a strain on decedent's body. The fact that the wound did not heal within the normal time was utilized in the hypothetical (J.A. 91) and was brought out on cross-examination by Appellee's Counsel (J.A. 105). Appellant's Counsel then clearly had the right to determine the "usual prognosis," the same having been brought up on cross-examination, and its medical significance.

In view of the erroneous ruling of the lower Court that the "usual prognosis" could not be elicited, it is submitted that the instant case be reversed and remanded for a new trial.

III

The Lower Court was in error in refusing to allow appellant to read portions of Appellee's deposition into direct evidence

Appellee is incorrect in stating that Appellant offered the Appellee's deposition into evidence *en toto.* Appellant specifically stated that he was going to read "portions" of the deposition (J.A. 59-60), and it was this action and not an *en toto* reading that the lower Court refused to allow. F.R.C.P. 26(d) (2) and the cases cited by Appellant and Appellee clearly sanctioned this use of a party's deposition.

CONCLUSION

Appellant adopts her original conclusion.

Respectfully submitted,

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